

1-15-1985

State Legislatures versus the Supreme Court: Abortion Legislation in the 1980's

B. J. George Jr.

Follow this and additional works at: <http://digitalcommons.pepperdine.edu/plr>



Part of the [Constitutional Law Commons](#)

Recommended Citation

B. J. George Jr. *State Legislatures versus the Supreme Court: Abortion Legislation in the 1980's*, 12 Pepp. L. Rev. 2 (1985)
Available at: <http://digitalcommons.pepperdine.edu/plr/vol12/iss2/3>

This Article is brought to you for free and open access by the School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized administrator of Pepperdine Digital Commons. For more information, please contact Kevin.Miller3@pepperdine.edu.

State Legislatures *versus* the Supreme Court: Abortion Legislation in the 1980's†

B.J. GEORGE, JR.*

This article provides a broad overview of the continuity and changes in abortion legislation and cases in a variety of topic areas throughout the United States and abroad. The author concludes that further abortion law reform may be unnecessary.

Abortion regulation was a matter exclusively for state legislatures until 1973, when the United States Supreme Court brought medically indicated abortions within the protection of the fourteenth amendment in *Roe v. Wade*¹ and *Doe v. Bolton*.² As will be surveyed in Parts I and II of this article, some liberalization in the scope of lawful abortions was evident in several legislatures before 1973,** but few statutes approached the breadth of the privacy right decreed by the Court in *Roe* and *Doe*.

Since 1973, a majority of legislatures have tried to impose functional limitations on the availability of abortions both before and after viability. Many of these efforts have been invalidated by subsequent decisions by the Court, but in many instances the legislatures have left their statutes unrevised. Thus, the onus is on the courts to squelch efforts to invoke unconstitutional laws against pregnant women and their physicians. Unconstitutional laws still exist because, in many states, a majority of legislators are hostile to freely

† This article will comprise a portion of ABORTION, MEDICINE AND THE LAW, ed. D. Walbert, J. Butler, to be published by Facts on File (mid-1985). Published by permission.

* B.A., 1949, J.D., 1951, University of Michigan; Professor of Law, New York Law School.

** In Parts II and III of this article, only the names of the states and not specific statutory citations appear. For more information, see *infra* note 25.

1. 410 U.S. 113 (1973).

2. 410 U.S. 179 (1973).

available abortions,³ whereas in others they appear to be cowed by threats of reprisals at the polls from the so-called "right-to-life" movement.

A pragmatic understanding of the causes of unsatisfactory legislative coverage of abortion law does not change the fact that state statutes in too many jurisdictions provide no guidance to, or protection for, pregnant women and their medical advisors. Consequently, a legislative limbo occurs in which one of two phenomena is likely to appear.

The first possibility is that medical abortion becomes an out-of-view dimension of hospital administration governed by local or state public health regulations. This alternative may prove a practical accommodation acceptable to both legislators and physicians. Legislators are not called on to take action visible to their constituents which the latter will view as approving abortions, and the medical profession can treat abortion like any other dimension of medical practice. The second possibility is official disapproval of therapeutic abortions that will force pregnant women, their physicians, and the administrators of clinics to turn to the judiciary for redress.

Whether this state of affairs will change within the next decade or so is debatable. If it does, it will be because state legislatures accept as immutable the constitutional doctrines espoused by the Supreme Court; that the Court has not retreated from its earlier interpretation of the Constitution is evidenced by its reaffirmation of *Roe v. Wade* principles in its 1983 decision in *City of Akron v. Akron Center for Reproductive Health, Inc.*⁴

In the following pages, a brief review of the conflicting interests recognized in or affected by abortion legislation is provided. Next, the basic constitutional principles set forth by the Court in 1973 and thereafter are discussed. Finally, the compatibility of state legislation in 1984 with the federal Constitution is evaluated.

3. See *infra* notes 136-49 and accompanying text. Abortion proved a matter of virulent political controversy during the 1984 presidential election campaign. The Republican Party supported constitutional amendments to recognize fetal life as fundamental. Republican Party Platform Text of 1984, 42 Cong. Q. 2096, 2110 (Aug. 25, 1984), and called for appointment of judges at all levels "who respect traditional family values and the sanctity of human life." *Id.* at 2110-11. The Democratic Party supported the 1973 Supreme Court decisions and opposed constitutional amendments to restrict or overturn them; it stressed "reproductive freedom as a fundamental human right." Democratic Party Platform Text of 1984, 42 Cong. Q. 1747, 1767 (July 21, 1984).

4. 103 S. Ct. 2481 (1983). Justice Powell's opinion stated: These cases come to us a decade after we held in *Roe v. Wade* that the right to privacy grounded in the concept of personal liberty guaranteed by the Constitution, encompasses a woman's right to decide whether to terminate her pregnancy. Legislative responses to the Court's decision have required us on several occasions . . . to define the limits of a State's authority to regulate the performance of abortions. We . . . reaffirm *Roe v. Wade*. *Id.* at 2487 (citations omitted).

I. CONFLICTING INTERESTS AFFECTED BY ABORTION LEGISLATION

Discussions of the desirability or illicitness of abortion revolve about four foci: the fetus; the pregnant woman; the family into which a child will be born if a pregnancy goes to term; and the surrounding community.

As to the first focus, there clearly is a semantic issue. A choice from among an array of terms—conceptus, zygote, embryo, fertilized ovum, fetus or prenatal infant—advertises the thinking of the speaker and not a scientifically impeccable choice of terms.⁵ Which-ever term is selected, concern about fetuses typically reflects two contradictory schools of thought.

According to one of these schools, inviolate life comes into being from the time an ovum is fertilized. The strongest adherence to this view has been found within the Roman Catholic faith, which has condemned abortion under all circumstances.⁶ There is, however, also Protestant support for the idea.⁷ The second view is that the possible fate of a full-term fetus should be taken into account. If a child would be born deformed, mentally defective or otherwise incapable

5. On other semantic aspects of the abortion debate, see Fromer, *Abortion Ethics*, 30 NURSING OUTLOOK 234, 234-35 (April 1982) [hereinafter cited as *Fromer*]; Hardin, *Semantic Aspects of Abortion*, 24 ETC.: A REVIEW OF GENERAL SEMANTICS 263 (1967). See also Chemerinsky, *Rationalizing the Abortion Debate: Legal Rhetoric and the Abortion Controversy*, 31 BUFFALO L. REV. 107 (1982) [hereinafter cited as *Chemerinsky*].

6. Canon 1398 (1983): "A person who actually procures an abortion incurs a *latae sententiae* [automatic] excommunication." On the corresponding predecessor provision, canon 2350, § 1, see 8 C. BACHOFEN, COMMENTARY ON CANON LAW 397-402 (1931).

In support of the Roman Catholic position, see, e.g., Brown, *Recent Statutes and the Crime of Abortion*, 16 LOY. L. REV. 275 (1970); Decker & Decker, *The Credibility Gap That Kills*, 131 AMERICA 47 (Aug. 10, 1974); Giannella, *The Difficult Quest for a Truly Humane Abortion Law*, 13 VILL. L. REV. 257, 292 (1968) [hereinafter cited as *Giannella*]; Granfield, *Law and Morals*, 4 CRIMINOLOGICA 11 (Feb. 1967); Noonan, *Abortion: From "An Almost Absolute Value in History," MORAL PROBLEMS IN MEDICINE* 290 (S. Gorovitz et al. ed. 1976).

7. See, e.g., H. THIELICKE, ETHICS OF SEX 226-47 (J. Doberstein trans. 1964) [hereinafter cited as H. THIELICKE]; Baum, *Abortion: An Ecumenical Dilemma*, 99 COMMONWEAL 231 (Nov. 30, 1973); Brown, *An Evangelical Looks at the Abortion Phenomenon*, 135 AMERICA 161 (Sept. 25, 1976); Eller, *Let's Get Honest About Abortion*, 92 CHRISTIAN CENTURY 16 (Jan. 1-8, 1975); Ramsey, *Ethics of a Cottage Industry in an Age of Community and Research Medicine*, 284 NEW ENGLAND J. OF MED. 700, 701-03 (1971); Note, *Abortion Laws, Religious Beliefs and the First Amendment*, 14 VAL. U.L. REV. 487, 497-503 (1980).

Mainline Protestant denominations generally take a contrary position. For example, The United Methodist Church at its 1984 quadrennial general conference supported the doctrines espoused in United States Supreme Court precedent, see *infra* notes 110-31 and accompanying text, and asserted that continuance of pregnancies which endanger the life or health of women or the life, health or mental capacity of children is

of living a normal life, or born into a highly detrimental environment for which it could not be adequately compensated,⁸ it may be preferable to terminate its incipient life. This premise is likely to be an argument incident to advocacy of liberalized abortion based on social necessity.⁹ Adoption of the first view of fetal life impels rejection of all abortion.¹⁰ Yet to adopt the second is usually to favor abortion in a relatively wider array of instances.

The second focus is on pregnant women.¹¹ Most women concerned

"not a moral necessity." UNITED METHODIST CHURCH, BOOK OF RESOLUTIONS 92 (1984).

For a general survey of contemporary religious positions, see Nelson, *The Churches and Abortion Law Reform*, 1983 J. CHRIST. JURIS. 29.

Traditional Jewish law views abortion as a tort, not a criminal activity. However, some contemporary rabbinic sources speak of it in terms of homicide. See Sinclair, *Legal Basis for the Prohibition on Abortion in Jewish Law*, 15 ISRAEL L. REV. 109 (1980).

8. See Dahlberg, *Abortion*, in SEXUAL BEHAVIOR AND THE LAW 379, 389 (R. Slovenko ed. 1965); Krimmel & Foley, *Abortion: An Inspection Into the Nature of Human Life and Potential Consequences of Legalizing Its Destruction*, 46 U. CIN. L. REV. 725, 780-89 (1977) [hereinafter cited as *Krimmel & Foley*].

9. See Hardin, *Abortion—Or Compulsory Pregnancy?*, 30 J. MARRIAGE & THE FAMILY 246, 247 (1968); Samuels, *Termination of Pregnancy: A Lawyer Considers the Arguments*, 7 MED., SCI. & L. 10, 12-13 (1967).

10. See H. THIELICKE, *supra* note 7; but see *Giannella*, *supra* note 6, at 301-02.

11. See Jones, *Abortion and the Consideration of Fundamental Irreconcilable Interests*, 33 SYRACUSE L. REV. 565, 612-13 (1982) [hereinafter cited as *Jones*]; Thomson, *A Defense of Abortion*, 1 PHILOSOPHY & PUB. AFFAIRS 47 (1971); cf. Note, *Isolating the Male Bias Against Reform of Abortion Legislation*, 10 SANTA CLARA L. REV. 301 (1970).

Maternal life and health are increasingly recognized as grounds for lawful therapeutic abortions in other countries through legislation. For a survey of national laws, see Dourlen-Rollier, *Legal Problems Related to Abortion and Menstrual Regulation*, 7 COLUM. HUMAN RTS. L. REV. 120, 126-32 (1975).

The English Abortion Act, 1967, has had influence in other Commonwealth nations. See Dickens & Cook, *Development of Commonwealth Abortion Laws*, 28 INT'L & COMP. L.Q. 424, 442-56 (1979) [hereinafter cited as *Dickens & Cook*]; Menon, *The Law of Abortion With Special Reference to the Commonwealth Caribbean*, 5 ANGLO-AM. L. REV. 311, 327-37 (1976) [hereinafter cited as *Menon*].

The Canadian Criminal Code § 251(4) allows licensed medical practitioners to terminate pregnancies in licensed hospitals if necessary to preserve a woman's life or health. See generally Dickens, *Eugenic Recognition in Canadian Law*, 13 OSGOODE HALL L.J. 547, 562-65 (1975) [hereinafter cited as *Dickens*]; Micallef, *Meaning and Interpretation of "Unlawful" in Canada's Abortion Law*, 23 C. DE D. 1029 (1982).

Therapeutic abortion is asserted to be contrary to the Irish Constitution. Mathews, *Quantitative Interference with the Right to Life: Abortion and Irish Law*, 22 CATH. LAW. 344, 356-58 (1976). On a "right-to-life" amendment to that constitution, see *Recent Developments: This Amendment Could Kill Women*, 7 HARV. WOMEN'S L.J. 287 (1984).

In India, the Medical Termination of Pregnancy Act, 1971 (MTPA), replaced § 312 of the Indian Penal Code, which had allowed abortions only to save maternal life. MTPA § 3(2) allows termination of pregnancy by an individual medical practitioner during the first trimester, and from the thirteenth through the twentieth week on the good faith medical opinion of two practitioners, that continuation of pregnancy would risk the life of a pregnant woman or threaten grave injury to her physical or mental health, or that there is a substantial risk that the child, if born, will suffer from physical or mental abnormalities which will seriously handicap it. Grave injury to mental

with their legal position favor a free choice on their part. Indeed, this is a strong dimension of the Supreme Court's constitutional analysis.¹² One exception is the contention that intercourse producing pregnancy is licit only if done within marriage and for procreation.¹³ Hence, an unwanted pregnancy is unfortunate, but the fulfillment of divine mandate. Therefore, a woman must carry a fetus to term, whatever the consequences. This school of thought aside, most state-

health is presumed in instances of rape and contraceptive failure, and a woman's "actual or reasonably foreseeable environment" may be taken into account in determining the risk to maternal health. Abortions can be performed only by registered practitioners in a governmentally-approved facility, and must be consented to by the patient or her guardian if she is younger than 18. After the twentieth week of pregnancy, abortions are allowed only if necessary to preserve a woman's life; life-threatening emergencies also justify performance of abortions without the concurrence of a second practitioner in other than licensed facilities. See generally Bose, *Abortion in India: A Legal Study*, 16 INDIAN L. INST. J. 535 (1974) [hereinafter cited as Bose]; Menon, *Population Policy, Law Enforcement and the Liberalization of Abortion: A Socio-Legal Inquiry Into the Implementation of the Abortion Law in India*, 16 INDIAN L. INST. J. 626 (1974).

In Israel, the Criminal Law Amendment (Abortion) Law, 1977, allows consensual abortion for women under 17 or over 40, women pregnant because of illegal, consanguinous or nonmarital relations, women whose fetuses are likely to be born with physical or mental handicaps, or women whose pregnancies might cause grievous harm to them or their other children because of difficult family or social conditions experienced by them or their families. See Falk, *The New Abortion Law of Israel*, 13 ISRAEL L. REV. 103 (1978) (containing English translation of text at 109-10); Slater, Weiner & Davies, *Illegal Abortion in Israel*, 13 ISRAEL L. REV. 411 (1978).

In *Christian League of South Africa v. Rall*, [1981] 2 S.A. 820, the court denied the petitioning organization's claim to be appointed curator ad litem for the unborn child of an unmarried woman, pregnant as the result of rape, who had obtained a judicial certification for an abortion. See Bedil, *Can a Fetus Be Protected From Its Mother?*, 98 S. AFR. L.J. 462 (1981).

The West German therapeutic abortion statute, Law of June 18, 1974, [1974] Bundesgesetzblatt, Teil I, § 1297 (see legislative history in Horton, *Abortion Law Reform in the German Federal Republic*, 28 INT'L & COMP. L.Q. 288 (1979)), was declared unconstitutional by the Federal Constitutional Court, Jt. of Feb. 25, 1975, 39 Bundesverfassungsgericht, 1975 Juristenzeitung 206, on the basis that it conflicted with the Grundgesetz (Basic Law), art. 2(2), which guarantees everyone "the right to life and to inviolability of his person"; the term "Jeder" (everyone) was construed to embrace fetal life. See Gerstein & Lowry, *Abortion, Abstract Norms, and Social Control: The Decision of the West German Federal Constitutional Court*, 25 EMORY L.J. 849, 859, 863 (1976); Kommers, *Abortion and Constitution: United States and West Germany*, 25 AM. J. COMP. L. 255 (1977). On subsequent unsuccessful efforts by pro-choice proponents to invoke art. 8(1) of the European Convention before the European Commission on Human Rights, see Note, *Abortion Law Reform in Europe: The European Commission on Human Rights Upholds German Restrictions on Abortion* (Brueggemann and Scheuten v. Federal Republic of Germany), 15 TEX. INT'L L.J. 162 (1980) (also surveying contemporary legislative developments in Austria, France and Italy).

12. See *Roe v. Wade*, 410 U.S. 113, 152-54 (1973) (concerning privacy implications).

13. For an interpretation of Saint Augustine's view of sexual relations not too removed from this, see D. BROMLEY, *CATHOLICS AND BIRTH CONTROL* 9-15 (1965).

ments of policy are sympathetic toward pregnant women. This is based on the importance of health concerns rather than the complete favoring of free choice.¹⁴

A third focus is on the family unit to which the pregnant woman belongs and into which the baby will be born. Some schools of thought stress concern for the freedom of sexual partners to decide whether they will have children.¹⁵ Others emphasize the economic well-being of the whole family. The family unit may be adversely affected if limited resources must be stretched to care for another member, or the emotional deprivation experienced by siblings if parental care is diluted by yet another child.¹⁶ Concentration on factors like these almost always leads to support of liberal abortion.

A final focus is on the needs of the community. Any of the concerns already listed, of course, can be restated in terms of social interests (e.g., protection of the life of the fetus, protection of maternal health, or protection of the health of a viable family unit). But within the community dimension there are at least two additional concerns. One is the factor of population control. Abortion clearly can be a means of birth control, albeit a much less satisfactory form than mechanical or chemical contraceptive methods.¹⁷ In the past,

14. See, e.g., Comment, *The Right to Privacy: Does It Allow a Woman the Right to Determine Whether to Bear Children?*, 20 AM. U. L. REV. 136 (1970). See also *Roe v. Wade*, 410 U.S. at 154 (Court rejected absolute constitutional protection for abortions of choice not based on medical considerations).

15. See J. FLETCHER, *MORALS AND MEDICINE* 92-99 (Beacon Press ed. 1960); Thompson, *A Defense of Abortion*, 1 PHILOSOPHY & PUB. AFFAIRS 47 (1971).

16. See *Krimmel & Foley*, *supra* note 8, at 792-96. Only Japan appears to embody this specifically in its statute. Eugenic Protection Law (*Yu-seihogoho*) (Law No. 156 of 1948, as amended), art. 3(5) permits abortion "if there are several children and the mother's health will be seriously impaired if she again delivers." Art. 14 permits a doctor authorized by a district medical association to terminate a pregnancy at his or her discretion, with consent of both husband and wife, for several reasons, including the likelihood of substantial injury to the mother's health for either physical or economic reasons if the pregnancy continues to term (author's translation and paraphrase). Some Scandinavian legislation extends about as broadly. Clemmesen, *State of Legal Abortion in Denmark*, 112 AM. J. PSYCH. 662 (1956); Klitskog, *Survey of Legislation on Legal Abortion in Europe and North America*, 21 MEDICO-LEGAL J. 79 (1953).

The English Abortion Act, 1967, c. 87, § 1(2), permits medical practitioners to take account of "the pregnant woman's actual or reasonably foreseeable environment" in deciding whether, under § 1(1)(a), there is risk of "injury to the physical or mental health of the pregnant woman or any existing children of her family, greater than if the pregnancy were terminated." *Id.* at § 1(1)(a). See G. WILLIAMS, *TEXTBOOK OF CRIMINAL LAW* 256 (1978) [hereinafter cited as G. WILLIAMS, *CRIMINAL LAW*]; Simms, *Abortion Law Reform: How the Controversy Changed*, 1970 CRIM. L. REV. 567, 568-71. India's Medical Termination of Pregnancy Act, 1971, § 3(2) embodies similar considerations. See *supra* note 11.

17. The dividing line between abortion, on the one hand, and contraceptive devices or pharmaceuticals preventing the implantation on the uterine wall of a fertilized ovum, on the other, is not intrinsically clear. See *Roe v. Wade*, 410 U.S. at 160-61; Brahams, *Postcoital Pill and Intrauterine Device: Contraceptive or Abortifacient?*, 1983 LANCET, vol. 1, no. 8332, p. 1039 (May 7, 1983); Tunkel, *Modern Anti-Pregnancy*

the population control use of abortion has been evident in some cultures.¹⁸ With improved contraceptive methods, reliance on abortion for that purpose has become less necessary. Some writers have suggested that legalized abortion as a means of population control manifests an impermissible exercise of state power,¹⁹ or have ex-

Techniques and the Criminal Law, 1974 CRIM. L. REV. 461. On amniocentesis and other sex-determining and sex-selecting techniques, see Nolan-Haley, *Amniocentesis and the Apotheosis of Human Quality Control*, 2 J. LEGAL MED. 347 (1981); Warren, *Law of Human Reproduction: An Overview*, 3 J. LEGAL MED. 1, 49-51 (1982) [hereinafter cited as Warren]; Note, *Genetic Screening, Eugenic Abortion, and Roe v. Wade: How Viable is Roe's Viability Standard?*, 50 BROOKLYN L. REV. 113, 125-30 (1983); Note, *Sex Selection Abortion: A Constitutional Analysis of the Abortion Liberty and a Person's Right to Know*, 56 IND. L.J. 281, 284-88 (1981).

On other socio-economic concerns, see *Menon*, *supra* note 11, at 317-18.

18. See Roemer, *Abortion Law Reform and Repeal: Legislative and Judicial Developments*, 61 AM. J. PUB. HEALTH 500, 505-06 (1971) [hereinafter cited as Roemer], describing such a reliance on abortion in several Pacific Basin nations. India's Medical Termination of Pregnancy Act, 1971, seems strongly aimed at population control. See Kelkar, *Impact of the Medical Termination of Pregnancy Act, 1971: A Case Study*, 16 INDIAN L. INST. J. 603, 693 (1974) [hereinafter cited as Kelkar].

Traditional Japanese attitudes encouraged large families and therefore viewed the use of contraceptives as improper, even by married couples, see R. BEARDSLEY, J. HALL & R. WARD, *VILLAGE JAPAN* 335-36 (1959), but that view has weakened substantially, particularly in urban areas where nuclear families have replaced the extended family units typical of rural Japan. See R. DORE, *CITY LIFE IN JAPAN* 205 n.196 (1958). Kelkar, *supra*, at 619 records advice by Japan's former Premier Sato to Indian authorities not to rely heavily on abortion as a means of population control, based on Japanese experience.

19. See H. THIELICKE, *supra* note 7, at 215-25; Krimmel & Foley, *supra* note 8, at 796-97. Cf. *Planned Parenthood Ass'n of Kansas City v. Ashcroft*, 655 F.2d 848, 868-69 (8th Cir. 1981), *aff'd on other grounds*, 462 U.S. 476 (1983) (requirement that woman be told approximate length of pregnancy unconstitutional because it would eliminate use of menstrual extraction and similar techniques, which under the state law would be an abortion); *Margaret S. v. Edwards*, 488 F. Supp. 181, 190-91 (E.D. La. 1980) (definition of abortion was not impermissibly vague even though it might have included IUD's and morning-after pills [two forms of birth control], since no other statutory formulation does more precise, and abortion does not include contraceptive measures). N.M. STAT. ANN. § 30-5-1(A) (1984) defines pregnancy as implantation of an embryo in the uterus, which excludes morning-after pills from the scope of abortion provisions. OKLA. STAT. ANN. tit. 63, § 1-730(8) (West 1984) excludes from the definition of abortion birth control devices or medications. 18 PA. CONS. STAT. ANN. § 3203 (1983) excludes from the statutory definition of abortion the use of IUD's or birth control pills "to inhibit or prevent ovulation, fertilization or the implantation of a fertilized ovum within the uterus." W. VA. CODE § 16-2B-2 (1979) states that abortion is not considered an approved method of family planning and is excluded from state-supported family planning programs, and WIS. STAT. ANN. § 146.80(1) (West Supp. 1983) prohibits family planning services from promoting, encouraging or performing voluntary terminations of pregnancy.

On contraception as a desirable alternative to abortion, see Sneiderman, *Abortion: A Public Health and Social Policy Perspective*, 7 N.Y.U. REV. L. & SOC. CHANGE 187, 206-12 (1978) [hereinafter cited as Sneiderman].

The matter of *in vitro* fertilization is also addressed in some legislation, e.g., ILL.

pressed fear that it will result in too stark a decline in population levels to permit the state to survive.²⁰ In reality, however, abortion produces only incidental population control consequences,²¹ and so poses no serious threat either to population levels or citizens' liberties.²²

A second social factor addresses the freedom of the medical profession to approach termination of pregnancies on the same basis as other medical problems, free from arbitrary controls. This, too, has found strong support in the United States Supreme Court's constitutional jurisprudence.²³

These concerns, although not necessarily comprehensive, demonstrate the principal policy interests implicated by abortion legislation and constitutional precedents governing it. In most American jurisdictions to 1967, abortions were allowed only to save the lives of pregnant women.²⁴ Activists within the self-proclaimed "right-to-life" movement believe the United States Constitution should be amended to prohibit all abortions, or at a minimum, to allow only those necessary to save maternal life. In contrast, the Supreme Court's current constitutional analysis recognizes a woman's freedom of choice. Any

ANN. STAT. ch. 38, § 81-26(7) (Smith-Hurd Supp. 1984-1985) (person causing fertilization of human ovum outside body of a living human female is deemed to have care and custody of child for purposes of neglect statute, but does not apply to lawful participation in pregnancy termination); MINN. STAT. ANN. § 145.422(3) (West Supp. 1984) (felony to buy or sell living human conceptus); 18 PA. CONS. STAT. ANN. § 3213(e)(5) (1983) (various data to be reported, including "number of fertilized eggs destroyed or discarded"). See *Dickens*, *supra* note 11, at 573-74; Noonan, *Christian Tradition and the Control of Human Reproduction*, 1983 J. CHRIST. JURIS. 1, 11-15; Warren, *supra* note 17, at 5.

20. That may have underlain the rescission in 1956 of the USSR law allowing easy abortion. See G. WILLIAMS, *THE SANCTITY OF LIFE AND THE CRIMINAL LAW* 219-20 (1957) [hereinafter cited as G. WILLIAMS, *SANCTITY*]. That rescission in turn, however, is reported to have been modified. P. GEBHARD, W. POMEROY, C. MARTIN & C. CHRISTENSON, *PREGNANCY, BIRTH AND ABORTION* 208-11 (1958). So was a similar change in Bulgarian law. Roemer, *supra* note 18, at 504.

21. Sulloway, *The Legal and Political Aspects of Population Control in the United States*, 25 L. & CONTEMP. PROBS. 593, 597-98 (1960); Tietze, *The Current Status of Fertility Control*, 25 L. & CONTEMP. PROBS. 426, 442-44 (1960). Abortion as a means of population control seems to be significant in the People's Republic of China. Luk, *Abortion in Chinese Law*, 25 AM. J. COMP. L. 372, 389 (1977).

22. Indeed, Dr. Thielicke's concerns (see *supra* note 17 and accompanying text) find no home in American constitutional jurisprudence, which stresses the right of married and unmarried persons to have information about contraception and access to contraceptives. See *Bolger v. Youngs Drug Prods. Corp.*, 103 S. Ct. 2875 (1983) (holding federal statute prohibiting mailing of unsolicited advertisements for contraceptives unconstitutional); *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (legislation allowing distribution of contraceptives to married couples, but not to single persons, violated the equal protection clause); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (overturning state law banning use of contraceptives).

23. See *Roe v. Wade*, 410 U.S. 113, 156 (1973); see also *infra* notes 110-31 and accompanying text.

24. See *infra* notes 28-33 and accompanying text.

woman early in pregnancy may, in consultation with a willing physician, choose to have an abortion. As pregnancy advances, medical considerations become more significant but can never be eclipsed by a desire solely to preserve fetal life.

Accordingly, the tension in the 1980's is between abortion as a dimension of medical practice and prohibition of abortion as unwarranted termination of human fetal life. Abortion for purposes of population control, eugenics or preservation of family strength and harmony is not within the ambit of the Supreme Court's constitutional concerns, and finds no home in today's legislative chambers. For now, concerns of this nature are for moral, ethical and theological debate, not litigation or the legislative process.

II. LEGAL REGULATION OF ABORTION BEFORE 1967²⁵

A. Criminal Statutes

1. Statutes Penalizing Abortion

Criminal statutes outlawing abortion date from 1821.²⁶ Common law precedent was so scant that it played an insignificant role in evaluating the legality of abortions.²⁷ Statutes were roughly classifiable into those which prohibited all abortions and those which allowed some abortions under carefully limited circumstances. The laws of four states²⁸ provided no exceptions to a general prohibition against abortion, although judicial interpretations softened the harsh impact

25. In Parts II and III of this article, only the names of the states and not specific statutory citations appear. This is because almost all the legislation in force through 1973 has been replaced. Persons wishing then-contemporary citations may find them in George, *The Evolving Law of Abortion*, 23 CASE W. RES. 708 (1972) *passim*.

26. See G. WILLIAMS, *SANCTITY*, *supra* note 20, at 152-56; Quay, *Justifiable Abortion—Medical and Legal Foundations*, 49 GEO. L.J. 173, 231-38 (1960); Special Project: *Survey of Abortion Law*, 1980 ARIZ. ST. L.J. 87, 93-100.

27. Most common law cases covered only conduct that caused miscarriages after fetuses had quickened. See R. PERKINS & R. BOYCE, *CRIMINAL LAW* 186-88 (3d ed. 1982).

On the historical antecedents and development of the law of abortion, see Dellapena, *The History of Abortion: Technology, Morality, and Law*, 40 U. PITT. L. REV. 359, 365-407 (1979) [hereinafter cited as *Dellapena*]; Destro, *Abortion and the Constitutions: The Need for a Life-Protective Amendment*, 63 CALIF. L. REV. 1250, 1267-82 (1975) [hereinafter cited as *Destro*]; Dickens & Cook, *supra* note 11, at 425-41; Menon, *supra* note 11, at 323-26; Special Project: *Survey of Abortion Law*, 1980 ARIZ. ST. L.J. 67, 73-100 [hereinafter cited as *Special Project*].

28. La., Mass., N.J., Pa. In New Hampshire, the attempted abortion statute allowed no exceptions, while a companion provision penalizing completed abortions justified acts necessary to save maternal life.

of the legislation.²⁹ In the remaining states and the District of Columbia, abortions were permissible to preserve maternal life.

Even during that era, a few states went beyond saving the lives of pregnant women. Some permitted abortions to preserve the life of an unborn child,³⁰ a qualification with little or no effect other than to exempt induced labor at or near term from the scope of abortion law.³¹ Two states allowed abortions necessary to forestall serious and permanent bodily injury,³² while two other jurisdictions recognized any maternal health considerations.³³

A number of difficult legal problems arose in administering restrictive legislation. The first had to do with classes of persons authorized to perform abortions in instances of exigency. Twenty-six states appeared to allow anyone to perform an abortion,³⁴ while the rest required that abortions be done by physicians or surgeons.

The second turned on whether necessity was to be determined on an objective or strict liability basis, or whether a good faith belief in the existence of justifying medical grounds would suffice. Many statutes seemingly defined necessity as an objective element,³⁵ although some courts embraced a good faith professional belief that necessity existed, despite the rather plain statutory language to the contrary.³⁶ This usual language was ameliorated to some extent where the bur-

29. *Commonwealth v. Brunelle*, 341 Mass. 675, 677, 171 N.E.2d 850, 852 (1961) (physicians who acted in an honest belief that abortions were necessary to avoid great peril to maternal life or health did not violate the statute, if their judgments corresponded with the average judgment of doctors in the communities where they practiced); *State v. Brandenburg*, 137 N.J.L. 124, 126-28, 58 A.2d 709, 710-11 (1948) (abortions necessary to save life, but not health).

30. Conn., Minn., Mo., S.C., Wash.

31. This is dealt with today in statutory definitions of abortion. See *infra* notes 150-59 and accompanying text.

32. Colo., N.M.

33. Ala., D.C. Occasionally, broad judicial interpretations achieved the same result. See, e.g., *Walsingham v. State*, 250 So. 2d 857 (Fla. 1971) (physical and mental health); *Commonwealth v. Brunelle*, 341 Mass. 675, 171 N.E.2d 850 (1961) (physical and mental health).

34. Ala., Ariz., Conn., Idaho, Ind., Iowa, Ky., Me., Mich., Minn., Mont., Neb., Nev., N.D., Ohio, Okla., R.I., S.D., Tenn., Tex., Utah, Vt., W. Va., Wyo. Missouri legislation appeared to favor unlicensed abortionists. Abortion was proscribed unless necessary to preserve the life of a woman or her unborn child, but if the person performing an abortion was not a licensed physician, it was a defense that the performance had been advised by a duly licensed physician to be necessary for the purpose. Thus, a licensed physician was held to a standard of objective necessity while an unlicensed person could rely on medical advice whether or not the abortion was objectively necessary. The statute probably was intended to protect registered nurses and other hospital and medical staff personnel, but was not so limited.

35. Ala., Ariz., Conn., Idaho, Ill., Ind., Iowa, Ky., Me. (good faith belief no defense: *State v. Rudman*, 126 Me. 177, 136 A. 817 (1927)); Mich., Minn., Mo., Mont., Nev., N.D. (good faith belief no defense: *State v. Shortridge*, 54 N.D. 779, 211 N.W. 336 (1926)); Okla., R.I., S.D., Utah, Vt., Wyo.

36. *Honnard v. People*, 77 Ill. 481 (1875); *State v. Dunkleberger*, 206 Iowa 971, 221 N.W. 592 (1928).

den of proving want of medical necessity was placed on the prosecution.³⁷ Legislation in three states³⁸ and the District of Columbia was specific in stating that belief or motivation, and not objective necessity, governed the statutory exception from coverage.

The common law requirement that a fetus be quick before there could be a criminal abortion³⁹ had disappeared from statutory law: twenty-three states⁴⁰ referred only to pregnancy while four other states used "whether quick or not."⁴¹ In a handful of states, duration of pregnancy had begun to reemerge as a legal element of abortion which had begun to expand the scope of noncriminal abortion.⁴² Therapeutic abortions were limited in three states to the period of nonviability.⁴³

Another array of legal problems arose when, despite efforts to abort a fetus, no miscarriage occurred. This might have resulted from an interrupted or incompletely performed abortion or from the fact the woman was not pregnant. Some thirty-two states⁴⁴ and the District of Columbia eliminated the first problem by penalizing the administration of drugs, use of an instrument or any other means intended to produce an abortion. If a woman was not pregnant, however, it might have been argued under common law concepts that the crime was "impossible" to attempt.⁴⁵ Such a defense was unavailable under abortion statutes which prohibited abortion activity affecting

37. Compare the Supreme Court interpretation of the District of Columbia Code to that effect, in *United States v. Vuitch*, 402 U.S. 62 (1971).

38. Tenn., Tex., W. Va. Several statutes enacted after 1967 in Ark., Fla., Ga., N.Y., N.C., Or., and S.C. set a standard of "reasonable belief." That was a compromise position between strict liability and criminality turning on exclusively subjective considerations, but it achieved criminality based on criminal negligence. That standard of culpability seems inappropriate in the context of abortion, although perhaps recognizable in manslaughter prosecutions if a woman dies from the effects of a bungled abortion.

39. See generally G. WILLIAMS, *CRIMINAL LAW*, *supra* note 16, at 252-53; Note, *Abortion Reform: History, Status, and Prognosis*, 21 CASE W. RES. 521, 526-27 (1970).

40. Ala., Ariz., Colo., Del., Fla., Ga., Idaho, Ill., Ind., Kan., Ky., La., Mich., Miss., Mont., Neb., Nev., N.J., N.M., N.C., N.D., Okla., S.C., S.D., Tenn., Tex., Utah, Wyo.

41. Ark., Ky., Me., Tenn. Statutes punishing attempted abortion also reduced the practical significance of pregnancy as an element of the crime of abortion. See *infra* notes 45-50 and accompanying text.

42. Cal., Colo., Del., N.Y., Or., Wash.

43. Alaska, Hawaii, Wash.

44. Ala., Ariz., Ark., Cal., Conn., Del., Ga., Idaho, Ill., Ind., Iowa, Ky., La., Me., Mass., Mich., Mo., Mont., Neb., Nev., N.H., N.J., N.Y., N.C., N.D., Ohio, S.C., S.D., Tenn., Utah, Va., Wash. Texas had a special attempt provision which achieved the same result.

45. See generally W. LAFAVE & A. SCOTT, *CRIMINAL LAW* 438-46 (1972); R. PERKINS & R. BOYCE, *CRIMINAL LAW* 627-35 (3d ed. 1983). The doctrine of impossibility is

"any woman,"⁴⁶ a woman "whether pregnant or not,"⁴⁷ or a woman believed by a defendant to be pregnant.⁴⁸ Several courts relied on such language to affirm convictions for abortion even though the affected women were not pregnant.⁴⁹

2. Statutes Prohibiting Killing an Unborn Quick Child

Six states made it a separate offense to willfully kill an unborn quick child under circumstances in which, had the mother and not the fetus been killed, the crime would have been murder or manslaughter.⁵⁰ The aim of these statutes was not entirely evident from either language or interpreting precedent, but their targets probably were those who intended to cause pregnant women to miscarry without their consent and who used physical violence against them for that purpose.⁵¹

3. Statutes Penalizing Death of Pregnant Women Resulting from Abortion

Under classical theory, should a pregnant woman die as a result of a criminal abortion, the abortionist should be guilty of either second-degree murder based on felony murder in the commission of a felony not enumerated under traditional first-degree murder statutes, the intentional infliction of grave bodily injury, or the reckless performance of activity with known dangerous consequences, or guilty of manslaughter based on criminal negligence.⁵² Several states confronted such cases directly by providing augmented punishment for performing an abortion should a woman die as a result,⁵³ or by characterizing the death as either murder⁵⁴ or manslaughter.⁵⁵

repudiated in Model Penal Code § 5.01(1)(a)(P.O.D. 1962). See also N.Y. PENAL LAW § 110.10 (McKinney 1975).

46. Cal., D.C., Iowa, La., Mass., Ohio, Pa., Va., Wash., W. Va.

47. Ill.

48. Ind., Ky., R.I., Vt., Wyo.

49. *People v. Kutz*, 187 Cal. App. 2d 431, 435, 9 Cal. Rptr. 626, 629 (1960); *Urga v. State*, 155 So. 2d 719, 723 (Fla. Dist. Ct. App. 1963), *cert. denied*, 379 U.S. 829 (1964); *People v. Marra*, 27 Mich. App. 1, 5, 183 N.W.2d 418, 419 (1971); *Wyatt v. State*, 77 Nev. 490, 503, 367 P.2d 104, 111 (1961). Cf. *Williams v. State*, 218 Tenn. 359, 363-66, 403 S.W.2d 319, 322-23 (1966) (no defense that substances and instruments could not cause miscarriage). The Kentucky and Maine statutes, however, varied punishment levels according to whether a miscarriage actually resulted.

50. Ark., Fla., Mich., Miss., N.D., Okla.

51. Such statutes clearly accorded independent personality to fetuses since the crime was called manslaughter and usually placed with other homicide offenses (where abortion legislation did not usually appear).

52. See G. WILLIAMS, *CRIMINAL LAW*, *supra* note 16, at 244-45; Wechsler & Michael, *Rationale of the Law of Homicide*, 37 COLUM. L. REV. 701, 702-23 (1937).

53. Colo., Mass., N.J., N.M., R.I., S.C., Vt.

54. D.C., N.H., Tex., W. Va.

55. Mich., Mo., N.Y., N.D.

4. Statutes Penalizing Women Who Seek Abortions

In default of special legislation, women who sought or submitted to abortions were generally not viewed as accomplices to the crime.⁵⁶ Rhode Island and Vermont preserved that doctrine by statute.⁵⁷ In several states, however, legislatures decreed that women who solicited or submitted to abortions that were not necessary to preserve their lives were criminals.⁵⁸ These statutes had two significant legal consequences and one practical result as well.

One consequence was that accompanying statutes sometimes required corroboration of a woman's testimony,⁵⁹ or were interpreted in that way.⁶⁰ A second was that women who underwent abortions, as putative criminal defendants, could claim privilege against self-incrimination when summoned to testify for the prosecution against an abortionist.⁶¹ Because, however, that testimony frequently is critical to establishing guilt, some legislatures either purported to abolish

56. See, e.g., *Heath v. State*, 249 Ark. 217, 219, 459 S.W.2d 420, 422 (1970), *cert. denied*, 404 U.S. 910 (1971); *Commonwealth v. Follansbee*, 155 Mass. 274, 277, 29 N.E. 471, 471 (1892); *In re Vickers*, 371 Mich. 114, 118-19, 123 N.W.2d 253, 254-55 (1963) (woman could not be held for commission of abortion on herself, and thus was not an aider or abettor thereof); *In re Vince*, 2 N.J. 443, 450, 67 A.2d 141, 144 (1949) (interpreted statute failing to denounce participation in abortion by pregnant woman as evidencing legislative policy to leave woman involved unpunished); *State v. Shaft*, 166 N.C. 407, 409, 81 S.E. 932, 933 (1914); *Smartt v. State*, 112 Tenn. 539, 553, 80 S.W. 586, 589 (1904); *Willingham v. State*, 33 Tex. Crim. 98, 99, 25 S.W. 424, 424 (1894). Compare *State v. Clifford*, 133 Iowa 478, 480, 110 N.W. 921, 922 (1907) (victim could not be charged because she had died as a result of the abortion, but court characterized her as a conspirator so that her statements were admissible against the abortionist as a declaration promoting the common criminal enterprise), with *Snyder Appeal (Commonwealth v. Fisher)*, 398 Pa. 237, 246, 157 A.2d 207, 212 (1960) (woman is a victim and cannot be a conspirator). *Contra Steed v. State*, 27 Ala. App. 263, 170 So. 489, *aff'd*, 233 Ala. 159, 170 So. 490 (1936); *State v. McCoy*, 52 Ohio St. 157, 160, 39 N.E. 316, 316 (1894).

On the English law, see 11 HALSBURY'S LAWS OF ENGLAND ¶¶ 1191-92 (4th ed. 1976); G. WILLIAMS, *CRIMINAL LAW*, *supra* note 16, at 253.

57. Revisers' comments to Louisiana statute indicated an intent to preserve earlier case law to the same effect.

58. *Ariz., Cal., Conn., Idaho, Ind., Minn., N.Y., N.D., Okla., S.C., Utah, Wash., Wis., Wyo.* State courts did not always apply the literal language of these statutes outside their specific coverage, and thus held that women were not accomplices under the primary abortion statutes. See *State v. Burlingame*, 47 S.D. 332, 198 N.W. 824 (1924); *State v. Cragun*, 85 Utah 149, 38 P.2d 1071 (1934).

59. *Cal., Idaho, Mont., N.D., S.C.*

60. *People v. Peyser*, 380 Ill. 404, 44 N.E.2d 58 (1942); *State v. McCoy*, 52 Ohio St. 157, 39 N.E. 316 (1894).

61. See *Snyder Appeal (Commonwealth v. Fisher)*, 398 Pa. 237, 157 A.2d 207 (1960).

privilege in such cases,⁶² or conferred immunity against prosecution for complicity in abortion on women who testified.⁶³ That brought the matter around full circle to where it would have been had participating women not been denominated criminals in the first place.⁶⁴ However, legislation penalizing abortion patients may have conferred a practical advantage on prosecutors by allowing them to threaten prosecution if a woman did not cooperate and to promise her immunity from prosecution if she did.

5. Statutes Penalizing Activity Facilitating Performance of Abortions

Physicians performing abortions use instruments which are part of the ordinary equipment of gynecologists and obstetricians.⁶⁵ It is unrealistic for law enforcement officials to attempt to control the use of such instruments; in any event, the very nature of physician and hospital supply channels makes it unlikely that laypersons could procure them. In the decades before *Roe v. Wade*, however, self-induced abortions were a major public health problem,⁶⁶ and the devices and chemical substances used were clearly identifiable and devoid of legitimate modern uses. Since they were controllable without adverse impact on legitimate medical practice, legislatures consistently tried to control their availability.

The advertising of abortifacients was penalized in twenty-three states. In nineteen of them, a special statute covered abortifacients either alone or in the context of medicines preventing conception, curing venereal disease and the like,⁶⁷ while in others the prohibition appeared in the context of obscenity regulation.⁶⁸ The unconstitutionality of this form of legislation was recognized only recently.⁶⁹ State legislatures also sought to regulate commerce in abortifacients by prohibiting their manufacture,⁷⁰ distribution,⁷¹ furnishing,⁷² keep-

62. Minn., Wash. Such statutes were obviously unconstitutional under *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964); *Malloy v. Hogan*, 378 U.S. 1 (1964).

63. Nev., N.J., Ohio, S.C.

64. See, e.g., *In re Vickers*, 371 Mich. 114, 123 N.W.2d 253 (1963); *In re Vince*, 2 N.J. 443, 67 A.2d 141 (1949).

65. J. BATES & E. ZAWADSKI, CRIMINAL ABORTION 38-39 (1964).

66. *Id.* at 85-91.

67. Ariz., Cal., Conn., Del., Fla., Idaho, Ill., Ind., La., Mass., Mich., Mo., Pa., R.I., S.D., Vt., Va., Wis., Wyo. Like statutes were repealed in 1967 and 1968 in Maine and Maryland.

68. E.g., Colo., Miss.

69. See *infra* note 442 and accompanying text.

70. Mass. (subsequently declared unconstitutional in *Eisenstadt v. Baird*, 405 U.S. 438 (1972), in its application to contraceptives), Minn., Nev., N.Y., Wash.

71. Colo., Ill., La., Md.

72. Tex. (invalidated in *Roe v. Wade*, 314 F. Supp. 1217 (N.D. Tex. 1970), *aff'd on other grounds*, 410 U.S. 113 (1973)).

ing or exposing for sale,⁷³ giving away,⁷⁴ or lending.⁷⁵ Two states required all sales to be under registerable prescriptions.⁷⁶ Oregon penalized those who furnished premises knowing that nontherapeutic abortions would be performed there. Most of this legislation, too, is incompatible with modern first amendment notions.⁷⁷

III. ACCELERATING TRENDS TOWARD LEGALIZED THERAPEUTIC ABORTION: 1968-1973

A. Coverage of Revised Abortion Legislation

1. Grounds for Therapeutic Abortions

The Model Penal Code,⁷⁸ promulgated by the American Law Institute in 1962, asserted a strong and perhaps paramount influence on a legislative expansion of the grounds for legal abortion during the period 1968-1973. The Code posited the lawfulness of abortions necessary to safeguard the physical and mental health of pregnant women; thirteen states had recognized this ground by 1973.⁷⁹ A second ground for abortion, accepted in twelve states, allowed pregnancies to be terminated on eugenic grounds, *i.e.*, because a fetus if born would be seriously mentally or physically handicapped.⁸⁰ A third, based on humanitarian considerations, permitted victims of rape⁸¹ or incest⁸² to have their pregnancies terminated. Three states, however, went

73. Colo., Del., Ill., Iowa, Md., Mass., Mich., Minn., Miss., Mo., Nev., R.I., Vt., Wash.

74. Colo., Del., Iowa, Mass., Minn., Miss., Mo., Nev., Vt., Wash.

75. Colo., Mass., Miss.

76. Colo., Mich.

77. See *infra* note 454 and accompanying text. On the English law, see 11 HALSBURY'S LAWS OF ENGLAND ¶ 1193 (4th ed. 1976); G. WILLIAMS, CRIMINAL LAW, *supra* note 16, at 264-65.

78. MODEL PENAL CODE § 230.3 (Official Draft & Revised Comments 1980).

79. Ark., Cal., Colo., Del., Fla., Ga., Kan., Md., N.M., N.C., Or., S.C., Va. English legislation adopted the same position. English Abortion Act, 1967, c. 87, § 1(1)(a). See G. WILLIAMS, CRIMINAL LAW, *supra* note 16, at 257-60.

80. Ark., Colo., Del., Fla., Ga., Kan., Md., N.M., N.C., Or., S.C., Va. The English Abortion Act contains similar coverage. English Abortion Act, 1967, c. 87, § 1(1)(b) ("substantial risk" of "such physical abnormalities as to be seriously handicapped"). See G. WILLIAMS, CRIMINAL LAW, *supra* note 16, at 256-57. Similar legislation is found in Singapore (Singapore Abortion Act, 1969), and South Australia. See Roemer, *supra* note 18.

81. Ark., Cal., Colo., Del., Fla., Ga., Kan., Md., Miss., N.M., N.C., Or., S.C., Va. Whether statutory as well as forcible rape was included had to be determined in each state in light of statutory cross-references.

Parliament declined to recognize rape as an independent basis for abortion. See G. WILLIAMS, CRIMINAL LAW, *supra* note 16, at 260-61.

82. Ark., Cal., Colo., Del., Fla., Kan., N.M., N.C., Or., S.C., Va.

far beyond the Model Penal Code pattern to eliminate all restrictions on medically indicated abortions.⁸³ Consequently, only those jurisdictions were relatively free of impact from the 1973 Supreme Court decisions in *Roe* and *Doe*, as far as grounds for justifiable abortion were concerned.

2. Length of Pregnancy

As mentioned earlier,⁸⁴ length of pregnancy often bore on the lawfulness of therapeutic abortions. Thus, even the three most liberal states before 1973 found this dimension of their statutes invalidated.

3. Residency Requirements

As some legislatures expanded the permissible scope of therapeutic abortions, they manifested a fear that their states would become abortion havens for residents of other jurisdictions with restrictive laws. Therefore, a number required periods of residency before an abortion could be performed.⁸⁵ Such legislation usually placed the burden on pregnant women to assert residency, not on physicians to ascertain the truth of claims of residency; only the Georgia and Virginia statutes attached perjury consequences to declarations of residency. These statutes fell under *Doe v. Bolton*.⁸⁶

4. Preliminary Approval by Medical Peers

Even before the abortion law revision movement a number of states required⁸⁷ or permitted, as an alternative to an operating physician's personal professional judgment, the advice of other independent physicians.⁸⁸ Later legislation generally mandated preliminary consultation with or approval by medical colleagues before abortions could be performed. Approval could be gained through certification by medical practitioners other than a physician wishing to terminate a pregnancy,⁸⁹ by a hospital review committee,⁹⁰ or by both.⁹¹ Because peer concurrence took time, several states legislated an emer-

83. Alaska, Hawaii, Wash. The English Abortion Act, 1967, c. 87, §§ 1(1)(a), (2), reaches about the same result by permitting medical practitioners to consider the actual or reasonably foreseeable environment of pregnant women in deciding whether their physical or mental health may be injured by pregnancy, as well as the risk to siblings if an additional child is born. See also *supra* note 16.

84. See *supra* notes 39-44 and accompanying text.

85. Alaska, Ark., Del., Ga., Hawaii, N.C., Or., S.C., Va., Wash.

86. See *infra* notes 298-300 and accompanying text.

87. La., Miss.

88. Fla. (repealed 1972), Neb., N.H., Ohio, Wis. Missouri provided for advice by one duly licensed physician if an abortion was performed by one who was not a duly licensed physician. On this anomaly, see *supra* note 34.

89. Ark., Del., Ga., Kan., N.C., Or., S.C. Concurring physicians generally could not be relatives of or associated in medical practice with a doctor who wished to perform an abortion. The English Abortion Act, 1967, c. 7, § 1(1), requires the good faith opin-

gency exception for situations in which a woman's life would be put in jeopardy unless an abortion were performed immediately. A ratification of medical necessity then had to be obtained swiftly after an abortion.⁹² The degree to which such requirements have survived the Court's 1973 abortion decisions is discussed below.⁹³

5. Special Approval in Rape and Incest Cases

Statutes which allowed abortion in rape and incest cases on humanitarian grounds⁹⁴ generally required some form of substantiation. A woman's claim of violation was not an automatic reason because medical grounds did not necessarily justify abortion in all instances of sexual assaults. Sometimes some form of complaint or affidavit by a victim sufficed,⁹⁵ but more commonly approval or certification by prosecuting authorities was needed.⁹⁶

6. Persons Authorized to Perform Abortions

Revised statutes before 1973 required terminations of pregnancy to be performed by physicians licensed in the jurisdiction.⁹⁷ The statutes did not touch on the legal status of nurses and medical paraprofessionals who performed or participated in lawful therapeutic abortions, but one may assume that prosecuting authorities were unenthusiastic about prosecuting persons acting in such a capacity. At any rate, no precedent on the matter emerged.

7. Place of Performance of Abortions

Statutes which restricted the grounds for lawful abortion to health,

ion of two medical practitioners, as does India's Medical Termination of Pregnancy Act, 1971, § 3(2).

90. Cal., Colo., Del., Ga., Md., N.M., Va. Alaska left the matter to administrative regulation. On the counterpart requirement under the CANADIAN CRIMINAL CODE § 251(4), see Harris & Tupper, *Study of Therapeutic Abortion Committees in British Columbia*, 11 U. BRIT. COLUM. L. REV. 81 (1977) (in comparison with the English Abortion Act, 1967).

91. Del., Ga.

92. Ark., Kan., N.C., Or., S.C., Wash. The English Abortion Act, 1967, c. 87, § 1(4), creates an emergency exception if abortion is necessary to save the life or prevent grave permanent injury to a pregnant woman's physical or mental health.

93. See *infra* notes 318-25 and accompanying text.

94. See *supra* notes 80-81 and accompanying text.

95. Ark., Ga., N.M., N.C., S.C., Va.

96. Cal., Colo., Del., Ga., Md., Or., S.C.

97. Ark., Cal., Colo., Del., Fla., Ga., Hawaii, Kan., Md., N.M., N.Y., N.C., S.C., Va., Wash. England's Abortion Act, 1967, c. 87, §§ 1(1), 2(1)(b), contains a like requirement.

eugenic or humanitarian concerns almost always required abortions to be performed in accredited hospitals.⁹⁸ Two states, however, allowed abortions to be performed in approved clinics away from full-service hospitals.⁹⁹ The unconstitutionality of some situs restrictions is discussed below.¹⁰⁰

8. Required Records and Reports

As legislatures began to recognize the licitness of medically indicated abortions, they also instituted record keeping and reporting requirements. Sometimes, applications or certificates needed only to be retained in medical office or hospital patient files,¹⁰¹ but periodic reports to state agencies increasingly came to be mandated.¹⁰² Requirements were imposed that the identity of abortion patients be kept confidential. The constitutionality of much broader contemporary reporting legislation is commented on below.¹⁰³

9. Freedom of Conscience Exemptions

Many doctors, nurses and hospital employees have strong religious or moral scruples against abortion, and many private, particularly church-affiliated, hospitals will not tolerate the performance of abortions on their premises. As therapeutic abortion came increasingly to be recognized, the question arose whether individuals or hospitals could refrain legally from participation. Many states had legislated to allow a freedom of conscience exemption.¹⁰⁴ The number of such statutes has markedly increased since *Roe* and *Doe* were decided.¹⁰⁵

B. Resort to Litigation: The New Frontier

The wave or, perhaps more accurately, ripple of legislative reform probably had peaked by 1973. In any event, advocacy increased rap-

98. Ark., Cal., Colo., Del., Fla., Ga., Hawaii, Kan., Md., N.M., N.C., S.C., Va., Wash., Wis.

99. Alaska, Wash. England's Abortion Act, 1967, c. 87, § 1(3), allows abortions to be performed in a hospital or place approved by the Minister of Health or Secretary of State, subject to an emergency exception. *Id.* at § 1(4).

100. See *infra* notes 301-08 and accompanying text.

101. Ark., Colo., N.M. Sometimes this form of record keeping was imposed in addition to reporting requirements, as in Georgia, Maryland and Oregon.

102. Del., Fla., Md., S.C. Oregon left the matter to administrative regulation, which also is the stance of the English Abortion Act, 1967, c. 87, § 2.

103. See *infra* notes 366-79 and accompanying text.

104. Alaska, Ark., Colo., Del., Fla., Ga., Hawaii, Md., N.M., Or., S.C., Va., Wash. A similar exemption for medical practitioners is provided in England's Abortion Act, 1967, c. 87, § 4(1), but the burden of proof is on a practitioner who refuses an abortion on that basis. For a criticism of India's Medical Termination of Pregnancy Act, 1971, based on a failure to include similar language, see Minattur, *Medical Termination of Pregnancy and Conscientious Objection*, 16 INDIAN L. INST. J. 704 (1974).

105. See *infra* notes 384-410 and accompanying text.

idly for constitutional invalidation of legislative restrictions on therapeutic abortion.¹⁰⁶ The principal grounds advanced were the following: vagueness and indefiniteness in abortion legislation denying due process of law;¹⁰⁷ infringement of equal protection, through either an arbitrary legislative classification of eligibility and ineligibility for abortion¹⁰⁸ or financial discrimination against indigents;¹⁰⁹ or invasion of a constitutionally protected right of privacy.¹¹⁰ What might have evolved from a long process of constitutional litigation is unknowable, because the Supreme Court in 1973 asserted its primacy in the constitutional regulation of abortion legislation.

IV. BASIC CONSTITUTIONAL DOCTRINE

As matters eventuated, the Court built its doctrinal framework on the constitutional right to privacy, which it thought "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."¹¹¹ This analysis has been followed in subsequent cases,¹¹² most recently in *City of Akron v. Akron Center for Reproductive Health*.¹¹³ In selecting the "right to privacy" rationale, the Court specifically repudiated the claim that fetuses are "persons" within the

106. See generally Baude, *Constitutional Reflections on Abortion Reform*, 4 J.L. REFORM 1 (1970); Lucas, *Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes*, 46 N.C.L. REV. 730 (1968); Comment, *Abortion Laws: A Constitutional Right to Abortion*, 49 N.C.L. REV. 487 (1971).

For a retrospective view, see Moore, *Moral Sentiment in Judicial Opinions on Abortion*, 15 SANTA CLARA L. REV. 591 (1975).

107. See generally *Kolender v. Lawson*, 461 U.S. 352 (1983); *Smith v. Goguen*, 415 U.S. 566 (1974); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).

108. See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976) (invalidating legislation penalizing sale of alcoholic beverages to males at a greater age than females).

109. See, e.g., *Harris v. McRae*, 448 U.S. 297 (1980); *Mayer v. Chicago*, 404 U.S. 189 (1971).

110. See the contraceptive cases cited *supra* note 22; *Stanley v. Georgia*, 394 U.S. 557 (1969) (private possession of pornography).

111. *Roe v. Wade*, 410 U.S. 113, 153 (1973). See generally *Chemerinsky*, *supra* note 5; *Jones*, *supra* note 11, at 605-12; *King, The Juridical Status of the Fetus: A Proposal for the Legal Protection of the Unborn*, 77 MICH. L. REV. 1647, 1650-57 (1979); *Krimmel & Foley*, *supra* note 8; Moore, *Moral Sentiment in Judicial Opinions on Abortion*, 15 SANTA CLARA L. REV. 591, 625-34 (1975); Morgan, *Roe v. Wade and the Lesson of the Pre-Roe Case Law*, 77 MICH. L. REV. 1724 (1979); Parness & Pritchard, *To Be or Not To Be: Protecting the Unborn's Potentiality of Life*, 51 U. CIN. L. REV. 257 (1982) [hereinafter cited as *Parness & Pritchard*]; Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569 (1979).

112. *Colautti v. Franklin*, 439 U.S. 379, 386 (1979); *Planned Parenthood v. Danforth*, 428 U.S. 52, 60 (1976).

113. 103 S. Ct. 2481, 2487 (1983) (*Roe* is entitled to *stare decisis* recognition).

meaning of the fourteenth amendment: "[T]he unborn have never been recognized in the law as persons in the whole sense."¹¹⁴ Thus, a human being entitled to direct constitutional protection emerges at live birth, not conception.¹¹⁵ This premise has since been reaffirmed by the Court.¹¹⁶

The Court's basic constitutional premise is also attested to by the Court's rulings on standing to attack abortion legislation. A woman who is pregnant at the time legal action commences¹¹⁷ has standing

114. *Roe v. Wade*, 410 U.S. at 162.

115. *Id.* at 161-62.

116. *City of Akron v. Akron Center for Reproductive Health, Inc.*, 103 S. Ct. 2481, 2500 (1983):

[The ordinance] requires the physician to inform his patient that 'the unborn child is a human life from the moment of conception,' a requirement inconsistent with the Court's holding in *Roe v. Wade* that a State may not adopt one theory of when life begins to justify its regulation of abortions.

Id. (citation omitted).

That this is the crux of the Court's abortion rationale is reflected in efforts to persuade Congress to adopt for presentation to the states for ratification a right-to-life amendment or to enact a human life statute on the strength of § 5 of the fourteenth amendment. On the constitutionality of the latter approach, see Emerson, *The Power of Congress to Change Constitutional Decisions of the Supreme Court: The Human Life Bill*, 77 NW. U.L. REV. 129 (1982) (questioning constitutionality); Estreicher, *Congressional Power and Constitutional Rights: Reflections on Proposed "Human Life" Legislation*, 68 VA. L. REV. 333 (1982) (questioning constitutionality); Gordon, *The Nature and Uses of Congressional Power Under Section Five of the Fourteenth Amendment to Overcome Decisions of the Supreme Court*, 72 NW. U.L. REV. 656, 689-94 (1976) (questioning constitutionality); Hyde, *The Human Life Bill: Some Issues and Answers*, 27 N.Y.L. SCH. L. REV. 1077 (1982); Isaacs, *The Law of Fertility Regulation in the United States: A 1980 Review*, 19 J. FAM. L. 65, 70-71 (1980) [hereinafter cited as Isaacs]; Pilpel, *Hyde and Go Seek: A Response to Representative Hyde*, 27 N.Y.L. SCH. L. REV. 1101 (1982); Note, *Constitutionality of the Human Life Bill*, 61 WASH. U.L.Q. 219 (1983) (suggesting constitutionality). The implications of such a bill for certain forms of contraception are discussed in Note, *Personhood and the Contraceptive Right*, 57 IND. L.J. 579 (1982).

On the constitutional amendment, see *Destro*, *supra* note 27, at 1319-51. A survey of constitutional provisions in other nations may be found in Mukerjee, *World Constitutions and Population: A Preliminary Survey of World Constitutions*, 16 INDIAN L. INST. J. 675, 679-87 (1974).

The right to life controversy manifests itself in other ways. See, e.g., *Federal Election Comm'n v. Massachusetts Citizens for Life*, 589 F. Supp. 646 (D. Mass. 1984) (FEC could not invoke 2 U.S.C. § 441b (1982) to prevent antiabortion group from expending funds for a special election issue of its prolife publication, distributed at the time of an election for federal office. Congress did not intend to include such activities as regulated support for political candidates, since it would have violated the first amendment had it done so.); *Fausto v. Diamond*, 589 F. Supp. 451 (D.R.I. 1984) (city sponsorship of fountain as memorial to "The Unborn Child," with plaque quoting *Deut.* 30:19, "Choose life, then, that you and your descendants may live," did not amount to establishment of religion; plaintiffs pointed out Roman Catholic sponsorship of the memorial had a declared objective of including aborted fetuses).

117. In *Roe v. Wade*, 410 U.S. at 124-25, the Court rejected the appellee's contention that the case had been mooted because Roe's pregnancy long since had been terminated by birth or abortion. Pregnancies will come to term before usual appellate processes can be completed, but "[p]regnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us."

because her right of privacy is directly affected by legal prohibitions against abortion.¹¹⁸ On the other hand, married women (with their husbands) who assert that they might become pregnant in the future and require termination of pregnancy for health reasons do not have standing.¹¹⁹ Doctors who may be prosecuted or otherwise interfered with in their practice also are directly affected,¹²⁰ as are clinics and facilities providing abortion services.¹²¹

Having recognized that women's claims to abortion find support in a constitutional right to privacy, the Court nevertheless rejected the contention that such a right is absolute, allowing a woman "to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses."¹²² A "pregnant woman cannot be isolated in her privacy," for she "carries an embryo and, later, a fetus" ¹²³ Accordingly, abortion is never completely free from state regulation, although the scope of state powers grows slowly with a pregnancy and has ceiling limitations far lower than those recognized in state legislation before 1973.

During approximately the first trimester of pregnancy¹²⁴ "the abortion decision and its effectuation must be left to the medical

Therefore, pregnancy truly "could be 'capable of repetition, yet evading review. . . .'" *Id.* (quoting *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911)).

118. *Id.* at 153.

119. *Id.* at 127-29.

120. *Doe v. Bolton*, 410 U.S. 179, 188-89 (1973). *See also Colautti v. Franklin*, 439 U.S. 379 (1979). In *Roe v. Wade*, 410 U.S. at 124-27, a medical doctor, a defendant in a pending criminal prosecution, was not allowed to appeal. This was not because of a want of standing, but because the Court's doctrine of preclusion, set forth in *Samuels v. Mackell*, 401 U.S. 66 (1971), and *Younger v. Harris*, 401 U.S. 37 (1971), prohibits federal courts from intervening in matters pending in state courts; potential prosecutions are not within the doctrine. In *Doe v. Bolton*, 410 U.S. at 189, the Court thought it unnecessary to decide whether nurses, clergy, social workers and counseling services had standing because it resolved all the issues affecting them in connection with the physicians' attack on the state statute.

In *Harris v. McRae*, 448 U.S. 297, 318 n.21 (1980), discussed *infra* in notes 470-74 and accompanying text, the Court found that the constitutional entitlement of a physician advising financially unable Medicaid recipients was no greater than the entitlement of the patient; therefore, he or she had no greater due process protections.

121. Abortion clinics were allowed to litigate constitutional issues in *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), and *City of Akron v. Akron Center for Reproductive Health, Inc.*, 103 S. Ct. 2481 (1983). *See also Deerfield Medical Center v. City of Deerfield Beach*, 661 F.2d 328 (5th Cir. 1981) (abortion clinic had standing to assert privacy rights of women who might be unable to obtain abortions if municipality denied occupational license to clinic on basis of zoning ordinance).

122. *Roe v. Wade*, 410 U.S. at 153.

123. *Id.* at 159.

124. The Court's definition of "trimester" is discussed *infra* in notes 177-78 and accompanying text.

judgment of the pregnant woman's attending physician,' without interference from the State."¹²⁵ "The participation by the attending physician in the abortion decision, and his responsibility in that decision"¹²⁶ underlie the standing accorded to physicians to litigate abortion decisions.¹²⁷ Throughout early pregnancy, minor regulations can be imposed if they further "important health-related State concerns," but only if they do not "interfere with the physician-patient consultation or with the woman's choice between abortion and childbirth."¹²⁸

After the first stage, states may choose to impose reasonable restrictions relating to the preservation and protection of maternal health,¹²⁹ but state regulation cannot "depart from accepted medical practice" or increase the costs and limit the availability of abortions "without promoting important health benefits."¹³⁰ After viability,¹³¹ a state "may regulate an abortion to protect the life of the fetus and even may proscribe abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."¹³²

These, then, are the basics of the Court's regulation of abortion, the constitutional structure for most of its decisions on specific aspects of abortion law. This does not mean, however, that no other constitutional rationale will be invoked. For example, the Court has relied on the vagueness and indefiniteness concept under the due process clause¹³³ to strike down penal statutes invoked against physicians.¹³⁴ Equal protection, in contrast, has not had significant impact on abortion law.¹³⁵

125. *Planned Parenthood v. Danforth*, 428 U.S. at 61 (quoting *Roe v. Wade*, 410 U.S. at 164).

126. *Id.*

127. *See supra* note 120 and accompanying text.

128. *City of Akron v. Akron Center for Reproductive Health, Inc.*, 103 S. Ct. at 2493 (footnote omitted).

129. *Roe v. Wade*, 410 U.S. at 163.

130. *City of Akron v. Akron Center for Reproductive Health, Inc.*, 103 S. Ct. at 2493. On the minimal risk of medically-administered abortion, see *Sneideman, supra* note 19, at 194-97.

131. "[A] point purposefully left flexible for professional determination, and dependent upon developing medical skill and technical ability . . ." *Planned Parenthood v. Danforth*, 428 U.S. at 61 (footnote omitted). *See also infra* notes 179-82 and accompanying text.

132. *Planned Parenthood v. Danforth*, 428 U.S. at 61 (paraphrasing *Roe v. Wade*, 410 U.S. at 163-65).

133. *See cases cited supra* note 107.

134. *City of Akron v. Akron Center for Reproductive Health, Inc.*, 103 S. Ct. at 2503-04 (ordinance making it a misdemeanor not to dispose of remains of unborn children in "a humane and sanitary manner," held vague and indefinite); *Colautti v. Franklin*, 439 U.S. at 390-401 (viability determination and standard of care provisions in felony statute voided for vagueness).

135. *See infra* notes 462-65, 473-74 and accompanying text. Efforts to claim a right to abortion based on free exercise of religion under the first amendment likewise have

V. SCOPE AND CONSTITUTIONALITY OF CURRENT
ABORTION LEGISLATION

A. Legislative Responses to the 1973 Decisions

The initial impact of *Roe* and *Doe* was manifested by state high court decisions invalidating traditional abortion legislation.¹³⁶ On occasion, legislatures have apparently decided to do nothing. The recent New Jersey criminal code contains no abortion provisions.¹³⁷ Likewise, the text of the Texas provisions no longer appears; they have been replaced by a compiler's notation of "unconstitutional."¹³⁸ Most legislatures, however, revamped their statutes in response to or anticipation of judicial invalidation of pre-1973 legislation.

A handful of states retained¹³⁹ or adopted¹⁴⁰ a policy of leaving

been rejected. *Harris v. McRae*, 448 U.S. 297, 318-21 (1980); *Women's Servs. v. Thone*, 636 F.2d 206, 209 (8th Cir. 1980).

136. *E.g.*, *People v. Norton*, 181 Colo. 47, 507 P.2d 862 (1973); *State v. Mirmelli*, 54 Ill. 2d 28, 294 N.E.2d 257 (1973) (per curiam); *State v. Hultgren*, 295 Minn. 299, 204 N.W.2d 197 (1973) (per curiam) (nonphysician); *State v. Hodgson*, 295 Minn. 294, 204 N.W.2d 199 (1973) (per curiam) (physician); *Spears v. State*, 278 So. 2d 443 (Miss. 1973); *Commonwealth v. Jackson*, 454 Pa. 429, 312 A.2d 13 (1973) (per curiam) (nonphysician); *State v. Lawrence*, 261 S.C. 18, 198 S.E.2d 253 (1973); *State v. Munson*, 87 S.D. 245, 206 N.W.2d 434 (1973); *Doe v. Burk*, 513 P.2d 643 (Wyo. 1973). Although the court in *State v. Sulman*, 165 Conn. 556, 339 A.2d 62 (1973), held that the unconstitutionality of its abortion statute rendered it unenforceable against all offenders, in *State v. Menillo*, 171 Conn. 141, 368 A.2d 136 (1976) (on remand from *Connecticut v. Menillo*, 423 U.S. 9 (1975)), it held later that the statute's unconstitutionality as applied to physicians did not destroy its effectiveness as to nonphysicians.

137. The matter was left to a legislative study commission. New Jersey Criminal Law Revision Comm'n Final Report, Commentary 259 (1971). A comprehensive abortion regulation statute was approved by the New Jersey Legislature, Assembly Bill No. 1285, but was vetoed by Governor Brendan Byrne on Jan. 3, 1980.

Illegal abortions can be prosecuted under simple assault provisions, N.J. STAT. ANN. § 2C:12-1(a)(1) (West 1982), since consent to acts causing more than trifling inconvenience is legally irrelevant to criminality. *Id.* § 2C:2-10(b); MODEL PENAL CODE § 2.11(2) (P.O.D. 1962).

138. TEX. REV. CIV. STAT. ANN. arts. 4512.1-4512.4, 4512.6 (Vernon 1976). Criminal abortions could be prosecuted as assault under TEX. PENAL CODE ANN. §§ 22.01(a)(1), 22.02(a)(1) (Vernon 1974), however, and consent is valid only if a victim knows the injury to be a risk of "recognized medical treatment." *Id.* § 22.06(2)(B).

139. ALASKA STAT. § 08.64.105 (1982). See *Cleveland v. Municipality of Anchorage*, 631 P.2d 1073 (Alaska 1981). The state had taken this approach to the problem before 1973. See *supra* note 83 and accompanying text.

140. *E.g.*, NEV. REV. STAT. § 442.260(1) (1981) (although § 442.250 (1983) tracks the *Roe* grounds for lawful abortion); OHIO REV. CODE ANN. § 3701.341(A) (Page 1980) (although the provision lists only some matters for regulation without an ejusdem generis clause). Failure to comply with procedures in an administrative procedure act governing promulgation of regulations can invalidate regulations. See, *e.g.*, *McKee v. Likins*, 261 N.W.2d 566 (Minn. 1977) (regulation restricting use of public funds for therapeutic abortion invalidated for failure to comply with APA notice requirements).

regulation of therapeutic abortion to administrative agencies. Most have accomplished substantial revisions with the Supreme Court's reversal of its constitutional principles as their guide.¹⁴¹

Several legislatures, however, voiced their restiveness or outright opposition to the Court's doctrine. Some stated a preference for normal childbirth over abortion,¹⁴² and others affirmed the state's obligation to protect human life whether unborn or not.¹⁴³ Nebraska objected to Supreme Court "intrusion" and "deplored" the destruction of unborn human lives which would result,¹⁴⁴ while Montana announced its intent to restrict abortions to the extent it could do so constitutionally.¹⁴⁵ Illinois¹⁴⁶ and Kentucky¹⁴⁷ declared their intent to prohibit abortions should the Supreme Court reverse its constitutional stance or should the Constitution be amended to permit them to do so. Idaho has gone the furthest in that regard. It has standby provisions¹⁴⁸ to come into force through gubernatorial proclamation

141. Cf. MO. ANN. STAT. § 188.010 (Vernon 1983) ("It is the intention of the [legislature] to reasonably regulate abortion in conformance with the decisions of the supreme court of the United States"); 18 PA. CONS. STAT. ANN. § 3202(c) (Purdon 1983) ("In every relevant civil or criminal proceeding in which it is possible to do so without violating the Federal Constitution, the common and statutory law of Pennsylvania shall be construed so as to extend to the unborn the equal protection of the laws and to further the public policy of this Commonwealth encouraging childbirth over abortion.").

Articles on current abortion legislation from the standpoint of theology and ethics include Eidsmoe, *A Biblical View of Abortion*, 1983 J. CHRIST. JURIS. 17; Fletcher, *Abortion and the True Believer*, 91 CHRISTIAN CENTURY 1126 (Nov. 27, 1974); Fromer, *supra* note 5, at 239-40; Nelson, *The Churches and Abortion Law Reform*, 1983 J. CHRIST. JURIS. 29; Orloski, *Abortion: Legal Questions and Legislative Alternatives*, 131 AMERICA 50 (Aug. 10, 1974).

142. *E.g.*, IND. CODE ANN. § 16-10-3-4 (Burns 1983); MINN. STAT. ANN. § 256B.011 (West 1982); N.D. CENT. CODE § 14-02.3-01 (1981).

The Supreme Court indicated that states are not prevented from making such a value judgment and implementing it by allocation of public funds. *Maher v. Roe*, 432 U.S. 464, 474 (1977). See also *Harris v. McRae*, 448 U.S. 297, 314-15 (1980) (utilizing *Maher v. Roe* principles in the context of the Hyde amendment prohibiting the use of Medicaid funds for abortions; see *infra* text accompanying notes 470-74).

143. *E.g.*, ILL. ANN. STAT. ch. 38, § 81-21 (Smith-Hurd 1977 & Supp. 1984-1985) ("the unborn child is a human being from the time of conception and is, therefore, a legal person for purposes of the unborn child's right to life and is entitled to the right to life from conception under the laws and Constitution of this State"); KY. REV. STAT. § 311.710(5) (1983) ("declared policy . . . to recognize and to protect the lives of all human beings regardless of their degree of biological development . . ."); MONT. CODE ANN. § 50-20-102 (1983) ("tradition of the state of Montana to protect every human life, whether unborn or aged, healthy or sick . . . [and] intent to extend the protection of the laws of Montana in favor of all human life"); NEB. REV. STAT. § 28-325(4) (1979) ("this state is prevented from providing adequate legal remedies to protect . . . unborn human life"); N.D. CENT. CODE § 14-02.1-01 (1981) ("purpose . . . is to protect unborn human life . . . [and] reaffirms the tradition of the state of North Dakota to protect every human life whether unborn or aged, healthy or sick").

144. NEB. REV. STAT. § 28-325 (1979).

145. MONT. CODE ANN. § 50-20-102 -103 (1983).

146. ILL. ANN. STAT. ch. 38, § 81-21 (Smith-Hurd 1977 & Supp. 1984-1985).

147. KY. REV. STAT. § 311.710(5) (1983).

148. IDAHO CODE §§ 18-614 -18-615 (1979).

should the constitutional picture change.¹⁴⁹ Obviously, legislative resonations of this nature, while therapeutic for anti-abortion legislators and their constituents, have no legal force and must be ignored by state judges.

States vary in the placement of therapeutic abortion provisions within the body of statutes. Some have continued the tradition of penal code regulation supported by ancillary provisions elsewhere, but a great many have chosen the context of laws governing the healing professions with residual or ancillary criminal provisions. The statutory analysis which follows looks first at civil or civil-oriented legislation, then at criminal law provisions, and finally at restrictions affecting publicly funded abortion services.

B. Noncriminal Regulation of Therapeutic Abortion

1. Definitions

a. "Abortion."

The new focus on abortion as a medical technique has brought about modernized legal definitions, usually of the term abortion, but sometimes of "miscarriage"¹⁵⁰ or "feticide."¹⁵¹ A few states content themselves with defining abortion as termination of pregnancy,¹⁵² while others specify methods in a comprehensive way.¹⁵³

Abortion implies intent or purpose, but statutes frequently spell it out anyway, either generally¹⁵⁴ or in terms of intent to produce fetal

149. *Id.* § 18-613.

150. ME. REV. STAT. ANN. tit. 22, § 1596(1)(B) (1980).

151. IOWA CODE ANN. § 707.7 (West 1979). This may well reflect a legislative bias against abortion. See *supra* notes 5, 142-49 and accompanying text.

152. *E.g.*, LA. REV. STAT. ANN. § 37:1285(8)-(9) (West Supp. 1984); MD. PUB. HEALTH CODE ANN. § 20-208(a) (Supp. 1983); VA. CODE § 18.2-72 (1982); WASH. REV. CODE ANN. § 9.02.070 (1977).

153. *E.g.*, ILL. ANN. STAT. ch. 38, § 81-22(6) (Smith-Hurd Supp. 1984-1985) (criminal code context); ME. REV. STAT. ANN. tit. 22, §§ 1596(1)(A), 1598(2)(A) (1980); 18 PA. CONS. STAT. ANN. § 3203 (Purdon 1983); UTAH CODE ANN. § 76-7-301(1) (Supp. 1983) (including all procedures undertaken to kill a live unborn child and to produce miscarriage). See generally Warren, *supra* note 17, at 27; Note, *Criminal Liability of Physicians: An Encroachment on the Abortion Right?*, 18 AM. CRIM. L. REV. 591, 592-93 (1981).

154. *E.g.*, IDAHO CODE § 18-604(1) (1979) (intentional); IOWA CODE ANN. § 707.7 (West 1979) (intentional); KAN. STAT. ANN. § 21-3407(1) (1981) (purposeful); ME. REV. STAT. ANN. tit. 22, §§ 1596(1)(A), 1598(2)(A) (1980) (intentional); MASS. GEN. LAWS ANN. ch. 112, § 12K (West 1983) (knowing destruction or intentional expulsion or removal); MICH. COMP. LAWS ANN. § 333.2835(1) (West 1980) (purposeful); MO. ANN. STAT. § 188.015(1) (Vernon 1983) (intentional); NEB. REV. STAT. § 28-326(1) (Supp. 1984) (intent); N.Y. PENAL LAW § 125.05(2) (McKinney 1975) (intent); OKLA. STAT.

death.¹⁵⁵ More frequently, the intent element is stated inversely, *i.e.*, a purpose other than to induce live birth¹⁵⁶ or to remove a dead fetus.¹⁵⁷ Only rarely does a definition of abortion include references to viability¹⁵⁸ or period of gestation;¹⁵⁹ such matters usually are dealt with in substantive provisions.

b. "Conception."

A definition of conception probably is functionally unnecessary to delineate the scope of therapeutic abortion. Nevertheless, some states have specifically provided one in neutral terms such as "fecundation of the ovum by the spermatozoa."¹⁶⁰ Sometimes the definition relates to some other term like "pregnancy," while at other times it is synonymous with "fetus" or "unborn child." These terms are of doubtful constitutionality if invoked to limit therapeutic abortions.¹⁶¹

c. "Pregnancy."

The term "pregnancy" is defined variously as implantation of an embryo in the uterus,¹⁶² or as the condition of a woman carrying a fetus or embryo within her body as a result of conception.¹⁶³ The

ANN. tit. 63, § 1-730(1) (West 1984) (purposeful); R.I. GEN. LAWS § 23-4.7-1 (Supp. 1984) (intent); VA. CODE § 18.2-71 (1982) (intent); WYO. STAT. § 35-6-101(a)(i) (1977) (intent).

155. *E.g.*, ILL. ANN. STAT. ch. 38, § 81-22(6) (Smith-Hurd Supp. 1984-1985); KY. REV. STAT. § 311.720(1) (1983); TENN. CODE ANN. § 39-4-201(a)(1) (1982).

156. *E.g.*, FLA. STAT. ANN. § 390.011(1) (West Supp. 1984) ("intention other than to produce live birth"); IDAHO CODE § 18-604(1) (1979) (viable birth); IND. CODE ANN. § 35-1-58.5-1(b) (Burns 1979 & Supp. 1984); IOWA CODE ANN. § 702.20 (West 1979); NEV. REV. STAT. § 442.240 (1983); N.D. CENT. CODE § 14-02.1-02(1) (1981) (not including completion of incomplete spontaneous miscarriage); S.C. CODE ANN. § 44-41-10(a) (Law. Co-op. 1977) (other than delivery of viable birth); S.D. CODIFIED LAWS ANN. § 34-23A-1(1) (1977); UTAH CODE ANN. § 76-7-301(1) (Supp. 1983); V.I. CODE ANN. tit. 14, § 151(a) (Supp. 1983). *See also supra* note 154.

157. *E.g.*, FLA. STAT. ANN. § 390.011(1) (West Supp. 1984); IND. CODE ANN. § 35-1-58.5-1(b) (Burns 1979 & Supp. 1984); IOWA CODE ANN. § 702.20 (West 1979); ME. REV. STAT. ANN. tit. 22, §§ 1596(1)(A), 1598(2)(A) (1980); MASS. GEN. LAWS ANN. ch. 112, § 12K (West 1983); MO. ANN. STAT. § 188.015(1) (Vernon 1983); NEV. REV. STAT. § 442.240 (1983); N.D. CENT. CODE § 14-02.1-02(1) (1981) (embryo or fetus); OKLA. STAT. ANN. tit. 63, § 1-730(1) (West 1984); S.C. CODE ANN. § 44-41-10(a) (Law. Co-op. 1976); S.D. CODIFIED LAWS ANN. § 34-23A-1(1) (1977); UTAH CODE ANN. § 76-7-301(1) (Supp. 1983); V.I. CODE ANN. tit. 14, § 151(a) (Supp. 1983).

158. ALASKA STAT. § 18.16.010 (1981) (nonviable fetus). On the unconstitutionality of prohibitions against all abortions after viability, see *supra* notes 131-32, *infra* notes 180-83 and accompanying text.

159. *E.g.*, IOWA CODE ANN. § 707.7 (West 1979) (after end of second trimester); ME. REV. STAT. ANN. tit. 22, § 1596(1)(B) (1980) (miscarriage defined as interruption of pregnancy of less than 20 weeks duration).

160. *E.g.*, OKLA. STAT. ANN. tit. 63, § 1-730(4) (West 1984) ("fertilization . . . by the sperm of a male individual"); S.C. CODE ANN. § 44-41-10(g) (Law. Co-op. 1977); WYO. STAT. § 35-6-101a(iii) (1977).

161. *See infra* notes 220-22 and accompanying text.

162. N.M. STAT. ANN. § 30-5-1(A) (1978).

163. *E.g.*, MASS. GEN. LAWS ANN. ch. 112, § 12K (West 1983); PA. STAT. ANN. tit. 18,

first definition is another legislative means of exempting contraceptive techniques which prevent implantation ("morning-after pills") from the coverage of abortion statutes,¹⁶⁴ while the second definition usually is tied to legislative descriptions of fetuses or unborn children.

d. "Fetus" and related definitions.

Those state legislatures which have defined "fetus" have not been motivated by a desire to assure medical personnel that medical terminology is recognized in the law. Instead, they seem to have used such definitions as another way of sniping at the Supreme Court.¹⁶⁵

For example, Illinois states that "fetus" and "unborn child" each means a human being from fertilization until birth.¹⁶⁶ Kentucky defines "fetus" the same way.¹⁶⁷ Other states use the term "unborn child" to the same effect.¹⁶⁸ To the extent that these provisions serve to vent legislative steam and soothe right-to-life constituents, no harm is done. If, however, they are intended to limit the availability of medically indicated abortions, they are a nullity under the Supreme Court's constitutional doctrine.

e. "Trimester."

A few statutes contain definitions of trimesters, perhaps because that is significant under *Roe v. Wade*.¹⁶⁹ Idaho defines the first trimester as the initial thirteen weeks of pregnancy,¹⁷⁰ the second trimester as the portion of gestation between the fourteenth week and viability,¹⁷¹ and the third as the segment after viability.¹⁷² Penn-

§ 3203 (Purdon 1983); S.C. CODE ANN. § 44-41-10(f) (Law. Co-op. 1977); WYO. STAT. § 35-6-101(a)(vi) (1977).

164. See *supra* note 19.

165. See *supra* notes 142-49 and accompanying text.

166. ILL. ANN. STAT. ch. 38, § 81-22(9) (Smith-Hurd Supp. 1984-1985).

167. KY. REV. STAT. § 311.720(5) (1983).

168. E.g., MASS. GEN. LAWS ANN. ch. 112, § 12K (West 1983); MO. ANN. STAT. § 188.015(5) (Vernon 1983) ("[h]uman offspring from conception until birth at every stage of biological development"); OKLA. STAT. ANN. tit. 63, § 1-730(2) (West 1984) ("from the moment of conception, through pregnancy, and until live birth including the human conceptus, zygote, morula, blastocyst, embryo and fetus").

On Canadian doctrine, see Weiler & Catton, *The Unborn Child in Canadian Law*, 14 OSGOODE HALL L.J. 643, 645-47 (1976) [hereinafter cited as *Weiler & Catton*]; Note, *Abortion Law in Canada: A Need for Reform*, 42 SASK. L. REV. 221, 232-38 (1977).

169. See *supra* notes 124-32 and accompanying text.

170. IDAHO CODE § 18-604(4) (1979).

171. *Id.* § 18-604(5). The provision sets out a conclusive, irrebuttable presumption

sylvania uses a period of twelve weeks for the first trimester.¹⁷³ Illinois delineates the first trimester as twelve weeks from ovulation rather than computed on the basis of menstrual cycle,¹⁷⁴ whereas South Carolina computes it from conception.¹⁷⁵ Indiana divides each pregnancy into three equal parts of three months each.¹⁷⁶

In 1983, the Supreme Court selected the beginning of the last menstrual period experienced by a woman before impregnation as the means to define trimester.¹⁷⁷ The Court adhered to this trimester analysis as "a reasonable legal framework for limiting a State's authority to regulate abortions."¹⁷⁸ To the extent that state legislatures use a variant definition to limit the availability of abortions which the federal constitution guarantees, they invite invalidation of the offending provisions.¹⁷⁹

f. "Viability."

The point of viability is important under the Supreme Court's delineation of constitutionally protected abortion.¹⁸⁰ The Court defined viability as the point in a pregnancy at which "the fetus is 'potentially able to live outside the mother's womb, albeit with artificial aid.' Presumably the fetus is capable of 'meaningful life outside the

in favor of licensed physicians that the second trimester does not end before the beginning of the 25th week of pregnancy. *Id.*

172. *Id.* § 18-604(6).

173. PA. STAT. ANN. tit. 18, § 3203 (Purdon 1983).

174. ILL. ANN. STAT. ch. 38, § 81-22(1) (Smith-Hurd 1977 & Supp. 1984-1985). "Viability" is the only other term defined. *Id.* § 81-22(2).

175. S.C. CODE ANN. § 44-41-10(i) (Law. Co-op. 1977) (through 12th week); conception is defined *id.* § 44-41-10(g). The second trimester extends from the 13th through the 24th week, *id.* § 44-41-10(j), and the third trimester from the 25th week through termination of pregnancy. *Id.* § 44-41-10(k).

176. IND. CODE ANN. § 35-1-58.5-1(a) (Burns 1979 & Supp. 1984).

177. *City of Akron v. Akron Center for Reproductive Health, Inc.*, 103 S. Ct. 2481, 2493 n.15 (1983).

178. *Id.* at 2492 n.11. See also Comment, *The Trimester Approach: How Long Can the Legal Fiction Last?*, 35 MERCER L. REV. 891, 909-13 (1984).

179. A declaration of unconstitutionality is even more likely if criminal penalties turn on ascertaining the stage of pregnancy. IND. CODE ANN. § 35-1-58.5-3 (Burns 1979 & Supp. 1984) requires a physician to determine viability and certify which trimester of pregnancy the patient is in. Section 35-1-58.5-4 makes noncompliance a class C felony. If such a standard functions as an impediment to free implementation of a pregnant woman's constitutional claim to a therapeutic abortion, it will be struck down. See *City of Akron v. Akron Center for Reproductive Health, Inc.*, 103 S. Ct. at 2493.

180. See *supra* notes 131-32 and accompanying text. See also *Special Project, supra* note 27, at 128-47; Note, *Criminal Liability of Physicians: An Encroachment on the Abortion Right?*, 18 AM. CRIM. L. REV. 591, 600-01 (1981); Note, *Viability and Fetal Life in State Criminal Abortion Laws*, 72 J. CRIM. L. & CRIMINOLOGY 324 (1981); Note, *Current Technology Affecting Supreme Court Abortion Jurisprudence*, 27 N.Y.L. SCH. L. REV. 1221, 1239-42 (1982); Comment, *Fetal Viability and Individual Autonomy: Resolving Medical and Legal Standards for Abortion*, 27 U.C.L.A. L. REV. 1340, 1356-63 (1980); Comment, *Technological Advances and Roe v. Wade: The Need to Rethink Abortion Law*, 29 U.C.L.A. L. REV. 1194, 1202-14 (1982).

mother's womb,' . . . [which] 'is usually placed' at about seven months or 28 weeks, but may occur earlier."¹⁸¹ Quite a number of states have utilized that language or a near variant of it.¹⁸² This is obviously the only safe course, because the Court has made it clear that viability cannot be determined arbitrarily in terms of life, but must rest on each woman's pregnancy.¹⁸³

g. "Live born."

Four statutes contain definitions of live birth and live born.¹⁸⁴ These do not impact directly on abortion, but are relevant in connec-

181. *Planned Parenthood v. Danforth*, 428 U.S. at 63 (quoting *Roe v. Wade*, 410 U.S. at 160, 163). See also *Colautti v. Franklin*, 439 U.S. at 386.

182. *E.g.*, IDAHO CODE § 18-604(7) (1979); ILL. ANN. STAT. ch. 38, § 81-22(2) (Smith-Hurd Supp. 1984-1985) (reasonable likelihood of sustained survival of fetus outside womb, with or without artificial support); IND. CODE ANN. § 35-1-58.5-1(e) (Burns 1979 & Supp. 1984); IOWA CODE ANN. § 702.20 (West 1979) ("indefinitely outside womb"; "[t]he time . . . may vary with each pregnancy, and the determination of whether a particular fetus is viable is a matter of responsible medical judgment"); KY. REV. STAT. § 311.720(8) (1983); LA. REV. STAT. ANN. § 14:87.5 (West Supp. 1984) (indefinitely outside womb); MINN. STAT. ANN. § 145.411(2) (West Supp. 1984); MO. ANN. STAT. § 188.015(6) (Vernon 1983); NEB. REV. STAT. § 28-326(6) (Supp. 1984); N.D. CENT. CODE § 14-02.1-02(7) (1981); OKLA. STAT. ANN. tit. 63, § 1-730(3) (West 1984); PA. STAT. ANN. tit. 18, § 3203 (Purdon 1983) (stage of fetal development, when in the physician's judgment "in light of the most advanced medical technology and information available . . . there is a reasonable likelihood of sustained survival of the unborn child outside the body of . . . [the] mother, with or without artificial support."); S.C. CODE ANN. § 44-41-10(1) (Law. Co-op. 1977); TENN. CODE ANN. § 39-4-202(b)(3) (1982) (in providing information for women, physician must describe in equivalent terms); WYO. STAT. § 35-6-101(a)(vii) (1977).

183. *Planned Parenthood v. Danforth*, 428 U.S. at 64-65. There is latent difficulty in, *e.g.*, MINN. STAT. ANN. § 145.411(2) (West Supp. 1984) ("[d]uring the second half of its gestation period a fetus shall be considered potentially 'viable' "), if that is intended to extend the limitations on post-viability abortions to women whose fetuses are not yet viable. South Carolina establishes a presumption of viability no sooner than the 24th week of pregnancy. S.C. CODE ANN. § 44-41-10(1) (Law. Co-op. 1977). This is acceptable if a woman with a viable fetus can obtain an abortion based on medical considerations not related to her life and health (assuming that does not infringe the constitutional status of the fetus, an implication of its *Roe v. Wade* analysis the Court has not yet explored), but unacceptable if invoked to deny an otherwise proper abortion to a woman who has not experienced fetal life by the 24th week of pregnancy.

Viability constitutionally may be defined in terms of a reasonable likelihood that a fetus is capable of sustained survival outside the uterus. *Charles v. Carey*, 579 F. Supp. 464, 468-69 (N.D. Ill. 1983).

See also *Fromer*, *supra* note 5, at 237-39.

184. ILL. ANN. STAT. ch. 38, § 81-26(2) (Smith-Hurd Supp. 1984-1985) ("[i]t shall not be construed to imply that any human being aborted is not an individual under the Criminal 'Code of 1961.' "); ME. REV. STAT. ANN. tit. 22, § 1595 (1980); N.D. CENT. CODE § 14-02.1-02(4) (1981); 18 PA. CONS. STAT. ANN. § 3203 (Purdon 1983) ("human being was completely expelled or extracted from her or his mother and after such separation breathed or showed evidence of any of the following: beating of the heart, pulsation of

tion with legal responsibility to safeguard the lives of viable fetuses born alive during or as a consequence of an abortion.¹⁸⁵

2. Persons Performing Abortions

Roe v. Wade was explicit that abortion is a medical matter and that licit abortions must be performed by professionally qualified persons.¹⁸⁶ Accordingly, therapeutic abortion laws are uniform in restricting the performance of abortions to licensed physicians.¹⁸⁷ The

the umbilical cord, definite movement of voluntary muscles or any brain-wave activity").

185. See *infra* notes 347-51, 437-39 and accompanying text. In *Constitutional Right to Life Comm. v. Cannon*, 117 R.I. 52, 363 A.2d 215 (1976), the court held that states are bound by the chronological approach of the Supreme Court to accommodate the conflicting private and public interests.

186. 410 U.S. at 165. Abortion may be inferred to be a medical matter from the wording (i.e., the first trimester decision is left to the "medical judgment of the pregnant woman's physician"). *Id.*

187. *E.g.*, ALASKA STAT. § 18.16.010 (1981); CAL. HEALTH & SAFETY CODE § 25951 (West 1984); COLO. REV. STAT. § 18-6-101(1) (1978); CONN. GEN. STAT. ANN. § 53-31a(c) (West Supp. 1984); DEL. CODE ANN. tit. 24, § 1790(a) (1981); FLA. STAT. ANN. § 390.001(1)(a), (3) (West Supp. 1984); GA. CODE ANN. § 16-12-140(a) (1982); IDAHO CODE §§ 18-604(2), 18-608, 18-609 (1979), and 18-606(2) (hospital, nurse or other health care personnel do not commit a crime if in good faith they provide abortion-related services in reliance on the directions of a physician or pursuant to a hospital admission authorized by a physician); ILL. ANN. STAT. ch. 38, §§ 81-22(3), 81-23.1 (Smith-Hurd Supp. 1984-1985); IND. CODE ANN. §§ 35-1-58.5-1(d), 35-1-58.5-2(1)(A) (Burns 1979 & Supp. 1984); IOWA CODE ANN. § 707.7 (West 1979); KAN. STAT. ANN. § 21-3407(2) (1981); KY. REV. STAT. §§ 311.720(7), 311.750 (1983); LA. REV. STAT. ANN. § 37:1285(8.1), (9) (West Supp. 1984) (unless physician lacks training and experience to perform the procedure); ME. REV. STAT. ANN. tit. 22, § 1598(1), (3)(A) (1980); MD. PUB. HEALTH CODE ANN. §§ 20-207, 20-208(a) (Supp. 1983); MASS. GEN. LAWS ANN. ch. 112, §§ 12L, 12M (West 1983); MINN. STAT. ANN. § 145.412(1)(1) (West Supp. 1984) (or physician in training under supervision of licensed physician); MO. ANN. STAT. § 188.020 (Vernon 1983); MONT. CODE ANN. § 50-20-109(1)(a) (1983); NEB. REV. STAT. § 28-335 (1979) (abortion by other than a licensed physician a felony); NEV. REV. STAT. § 442.250(1)(a) (1983) (including physician in employ of United States); N.M. STAT. ANN. § 30-5-1(C) (1978); N.Y. PENAL LAW § 125.05(3) (McKinney 1975) (abortion by duly licensed physician is justifiable under certain circumstances); N.C. GEN. STAT. § 14.45.1(a), (b) (1981); N.D. CENT. CODE § 14.02.1-04(1) (1981); OKLA. STAT. ANN. tit. 63, § 1-731(A) (West 1984); 18 PA. CONS. STAT. ANN. § 3204(a) (Purdon 1983); S.C. CODE ANN. § 44-41-20 (Law. Co-op. 1977); S.D. CODIFIED LAWS ANN. §§ 34-23A-1(2) (including physician in employ of United States), 34-23A-3 to -5 (1977); TENN. CODE ANN. § 39-4-201(c) (1982); UTAH CODE ANN. §§ 76-6-301(2) (1978 & Supp. 1983), 76-7-302(1) (1978) (including qualified physician in federal employment); VA. CODE §§ 18.2-72 to .2-74 (1982); WASH. REV. CODE ANN. § 9.02.070 (1977); WYO. STAT. §§ 35-6-101 (a)(v), 35-6-103, 35-6-111 (1977) (statutory references are to physicians performing abortions, and abortion by other than a physician is punishable as a felony).

V.I. CODE ANN. tit. 14, § 151(b)(1) (Supp. 1983), refers to licensed physicians during the first 12 weeks of pregnancy, but subsections (2) and (3) limit abortions thereafter to those performed by licensed surgeons or gynecologists. If there is no supportable medical basis for that limitation, and it serves to make otherwise lawful abortions less readily available than would normally be the case, the latter limitation is unconstitutional under *City of Akron v. Akron Center for Reproductive Health, Inc.*, 103 S. Ct. at 2509-12.

If a state legislature does not legitimate therapeutic abortions performed by licensed

converse of this is that persons other than physicians who perform abortions can be punished.¹⁸⁸ Perhaps a potential area of litigation lurks concerning whether nurses or medical paraprofessionals can be prosecuted under such statutes. Often these individuals, who are supervised by licensed physicians and who follow accepted medical techniques in performing therapeutic abortions, appear to be covered by criminal statute, because they are not licensed physicians. One may assume that if a restriction of lawful abortion to licensed physicians is not consonant with accepted medical practice, and a consequence is the impediment of pregnant women in their quest for lawful abortions, the restriction is constitutionally unacceptable.¹⁸⁹

3. Physician-Patient Consultation

The Supreme Court has spoken of abortion as something based on physician-patient consultation,¹⁹⁰ because consent by the patient is a condition to lawful abortion.¹⁹¹ Counseling is reflected in different ways in legislation. It may be sanctioned for minors,¹⁹² or posited as an appropriate subject of administrative regulation.¹⁹³ As a form of consumer protection law, institutions announcing the availability of counseling services must have qualified staff members to provide them.¹⁹⁴ Illinois and Pennsylvania specifically require it as a condition for a determination that an abortion is necessary.¹⁹⁵

Some legislation,¹⁹⁶ however, clearly states that it is ancillary to more elaborate statutory requirements concerning information which

physicians, a court must read in that exemption from penal law coverage. *See, e.g.,* *People v. Bricker*, 389 Mich. 524, 208 N.W.2d 172 (1973).

188. *Connecticut v. Menillo*, 423 U.S. 9 (1975) (per curiam). *See infra* notes 412-15 and accompanying text.

189. *See City of Akron v. Akron Center for Reproductive Health, Inc.*, 103 S. Ct. at 2509-12.

190. *See id.* at 2493.

191. *Planned Parenthood v. Danforth*, 428 U.S. at 65-67. *See infra* notes 232-40 and accompanying text.

192. *E.g.*, V.I. CODE ANN. tit. 19, § 291(a) (1977) (public or private hospitals, institutions and personnel may counsel minors concerning pregnancy, including abortion).

193. *E.g.*, ILL. ANN. STAT. ch. 38, § 81-23.1(B)(1) (Smith-Hurd Supp. 1984-1985) (with legislatively mandated content); KY. REV. STAT. § 311.723(b)(2)(a) (1983) (but with legislative objectives specified); OHIO REV. CODE ANN. § 3701.341(A)(5) (Page 1980).

194. MO. ANN. STAT. § 188.063 (Vernon 1983); OKLA. STAT. ANN. tit. 63, § 1-736 (West 1984).

195. *E.g.*, ILL. ANN. STAT. ch. 38, § 81-23.1(B)(1)(a) (Smith-Hurd Supp. 1984-1985) (administrative regulations must provide for this); 18 PA. CONS. STAT. ANN. § 3204(b) (Purdon 1983).

196. OKLA. STAT. ANN. tit. 63, § 1-736 (West 1984); S.D. CODIFIED LAWS ANN. § 34-23A-10 (1977) (physicians must make available to patients at request information about

must be communicated to pregnant women before they can consent to abortion. If the informational process functions to deter or impede decisions to have abortions, it is unconstitutional,¹⁹⁷ and associated counseling requirements will fall with it.

4. Information to Patients

An informed consent is a prerequisite to a lawful therapeutic abortion.¹⁹⁸ A patient must be given information about "just what would be done and . . . its consequences,"¹⁹⁹ and state legislation may ensure that the abortion decision is made "in the light of all attendant circumstances—psychological and emotional as well as physical—that might be relevant to the well-being of the patient."²⁰⁰ In the case of immature minors, state concerns to protect pregnant girls and to promote family integrity justify special measures to ensure that "the abortion decision is made with understanding and after careful deliberation."²⁰¹ A sizeable number of states have picked up on this dimension of the Court's jurisprudence, in some instances to implement its intent, but at other times with an obvious purpose of scaring patients away from decisions to seek abortions. The latter form of legislation has produced a new level of constitutional intervention by the Court.²⁰²

Statutes call for communicating information that, in a physician's best professional judgment, a woman is pregnant²⁰³ and the length of the pregnancy to the time of consultation.²⁰⁴ They require informa-

professional social service and counseling service agencies in the state providing a full spectrum of alternative solutions for problem pregnancies).

197. See *infra* note 223 and accompanying text.

198. *Planned Parenthood v. Danforth*, 428 U.S. at 67, 85. See also *City of Akron v. Akron Center for Reproductive Health, Inc.*, 103 S. Ct. at 2499-2500.

199. *Planned Parenthood v. Danforth*, 428 U.S. at 67 n.7.

200. *Colautti v. Franklin*, 439 U.S. at 394.

201. *City of Akron v. Akron Center for Reproductive Health, Inc.*, 103 S. Ct. at 2500 n.32.

202. See *infra* notes 220-22 and accompanying text.

203. *E.g.*, ME. REV. STAT. ANN. tit. 22, § 1599 (Supp. 1984-1985); MO. ANN. STAT. § 188.039(2)(1) (Vernon 1983); NEV. REV. STAT. § 442.253(1)(a) (1983) (a copy of the pregnancy test results should be made available); N.D. CENT. CODE § 14-02.1-02(5)(a) (1981); R.I. GEN. LAWS § 23-4.7-3(d) (Supp. 1984); TENN. CODE ANN. § 39-4-202(b)(1) (1982).

204. *E.g.*, ILL. Ann. Stat. ch. 38, § 81-23.2(1)(iii) (Smith-Hurd Supp. 1984-1985) (gestational age of fetus at time abortion will be performed); KY. REV. STAT. § 311.726(2) (1983) (same); ME. REV. STAT. ANN. tit. 22, § 1599 (Supp. 1984-1985) (number of weeks from probable time of conception); MO. ANN. STAT. § 188.039(2)(2) (Vernon 1983) (same); NEV. REV. STAT. § 442.253(1)(b) (1983) (same); N.D. CENT. CODE § 14-02.1-02(5)(b) (1981) (based on information provided by patient or medical and laboratory evaluations); 18 PA. CONS. STAT. ANN. § 3205(a)(1)(iv) (Purdon 1983) (probable gestational age of unborn child at time abortion is to be performed); R.I. GEN. LAWS § 23-4.7-3(b) (Supp. 1984) (gestational age of fetus at time of disclosure); TENN. CODE ANN. § 39-4-202(b)(2) (1982) (based on information provided by patient or medical and laboratory evaluation).

tion about the abortion procedure to be used,²⁰⁵ and the effects²⁰⁶ and risks²⁰⁷ associated with abortion. Three states call for patients to be provided with the name of the physician who will perform the abortion.²⁰⁸ Several authorize communication of any other information a counselor believes significant to an informed consent.²⁰⁹ With

205. *E.g.*, DEL. CODE ANN. tit. 24, § 1794(a)(1) (1981); FLA. STAT. ANN. § 390.025(2) (West Supp. 1984); IND. CODE ANN. § 35-1-58.5-1(f) (Burns 1979 & Supp. 1984); MASS. GEN. LAWS ANN. ch. 112, § 12S (West 1983); MINN. STAT. ANN. § 145.412(1)(4) (West Supp. 1984); MONT. CODE ANN. § 50-20-104(3)(a) (1983); NEB. REV. STAT. § 28-326(8)(b) (Supp. 1984); OKLA. STAT. ANN. tit. 63, § 1-736 (West 1984) (such information must be given before a hospital can advertise that it offers counseling services); R.I. GEN. LAWS § 23-4.7-3 (Supp. 1984); S.C. Dep't of Health & Envtl. Control R. 61-12, § 203(C)(3) (1976); UTAH CODE ANN. § 76-7-305(1) (1978); VA. CODE § 18.2-76 (1982).

206. *E.g.*, DEL. CODE ANN. tit. 24, § 1794(a)(2) (1981) (probable effects of procedure on woman, including effects on child-bearing ability and possible future pregnancies); FLA. STAT. ANN. § 390.025(2) (West Supp. 1984); MINN. STAT. ANN. § 145.412(1)(4) (West Supp. 1984); MO. ANN. STAT. § 188.039(2)(4) (Vernon 1983) (possible emotional or psychological consequences); MONT. CODE ANN. § 50-20-104(3)(b) (1983) (physical and psychological effect); NEV. REV. STAT. § 442.253(1)(c) (1983) (any known immediate and long-term physical or psychological dangers); 18 PA. CONS. STAT. ANN. § 3205(a)(1)(ii) (Purdon 1983) ("[t]he fact that there may be detrimental physical and psychological effects which are not accurately foreseeable"); S.C. Dep't of Health & Envtl. Control R. 61-12, § 203(C) (1976).

207. *E.g.*, DEL. CODE ANN. tit. 24, § 1794(a)(4) (1981); ILL. ANN. STAT. ch. 38, § 81-23.5(1)(ii) (Smith-Hurd Supp. 1984-1985) (particular medical risks associated with particular abortion procedure to be employed); KY. REV. STAT. § 311.726(2) (1983) (same); ME. REV. STAT. ANN. tit. 22, § 1599 (Supp. 1984-1985) (same); MASS. GEN. LAWS ANN. ch. 112, § 12S (West 1983) (possible complications associated with use of procedure and performance of abortion itself); MO. ANN. STAT. § 188.039(2)(4) (Vernon 1983) ("immediate and long-term physical dangers of abortion and psychological trauma resulting from abortion and any increased incidence of premature births, tubal pregnancies and still-births following abortion"); NEV. REV. STAT. § 442.253(1)(c) (1983) (similar language to Missouri); N.D. CENT. CODE § 14-02.1-02(5)(d) (1981) (same); 18 PA. CONS. STAT. ANN. § 3205(a)(1)(iii) (Purdon 1983) ("[t]he particular medical risks associated with the particular abortion procedure to be employed including, when medically accurate, the risks of infection, hemorrhage, danger to subsequent pregnancies and infertility"), § 3205(a)(1)(v) (medical risks associated with carrying child to term) (Purdon 1983); R.I. GEN. LAWS § 23-4.7-3(d) (Supp. 1984) (but information need not be communicated if there is a medical basis, certified in writing in patient's record, for nondisclosure); TENN. CODE ANN. § 39-4-202(b)(6) (1982) (numerous benefits and risks are attendant on either continued pregnancy and childbirth or to abortion depending on patient's circumstances; physician to explain benefits and risks to best of ability and knowledge of circumstances), 39-4-202(c) (particular risks associated with pregnancy and childbirth and abortion or child delivery technique to be employed, including at least a general description of medical instructions to be followed after abortion or childbirth to insure safe recovery) (1982); UTAH CODE ANN. § 76-7-305.5(4) (Supp. 1983); VA. CODE § 18.2-76 (1982) (risks if any in her particular case to her health).

208. *E.g.*, ILL. ANN. STAT. ch. 38, § 81-23.2(1)(i) (Smith-Hurd Supp. 1984-1985); KY. REV. STAT. § 311.726(2) (1983); 18 PA. CONS. STAT. ANN. § 3205(a)(1)(i) (Purdon 1983).

209. *E.g.*, ILL. ANN. STAT. ch. 38, § 81-23.5(3) (Smith-Hurd Supp. 1984-1985) (physician or persons associated with them can express personal views concerning the validity or importance of information required to be communicated); KY. REV. STAT.

the possible exception of certain language in the Missouri, Nevada and North Dakota statutes bearing on the consequences of abortion, which may or may not be supportable by current medical knowledge,²¹⁰ the information required to be given is compatible with the Supreme Court's expectations.²¹¹ This probably cannot be said, however, of requirements that pregnant women be told about the use of anaesthesia or analgesics to prevent fetal pain,²¹² or information that abortion is a major surgical technique.²¹³

A common legislative requirement is that a pregnant woman be told about alternatives to abortion,²¹⁴ including the availability of

§ 311.726(4) (1983) (same); MO. ANN. STAT. § 188.039(3) (Vernon 1983); NEV. REV. STAT. § 442.253(1)(h) (1983); N.D. CENT. CODE § 14-02.1-02(5) (1981) (any other explanation of information which in the exercise of the physician's best medical judgment is reasonably necessary to allow the woman to give an informed consent with full knowledge of the nature and consequences of abortion); R.I. GEN. LAWS § 23-4.7-3(d) (Supp. 1984) (same); UTAH CODE ANN. § 76-7-305(2) (1978) (other factors deemed necessary to a voluntary and informed consent).

At least four states, Illinois, ILL. ANN. STAT. ch. 38, § 81-23.5 (Smith-Hurd Supp. 1984-1985), Nevada, NEV. REV. STAT. § 442.253(1) (1983), Pennsylvania, 18 PA. CONS. STAT. ANN. § 3208(a) (Purdon 1983), and Rhode Island, R.I. GEN. LAWS § 23-4.7-5(c) (Supp. 1984), require women to receive printed information in a language they can understand, with a notation whether an interpreter has been used during counseling. Statutes in Rhode Island, *id.* § 23-4.7-5 (d), and South Dakota, S.D. CODIFIED LAWS ANN. § 34-23A-10.1 (Supp. 1984), allow for a copy to the patient at her request.

210. To the extent there is no significantly greater risk of premature births, tubal pregnancies and stillbirths following induced abortion in comparison to spontaneous miscarriages and normal childbirth, based on current medical experience, the statutory language probably provides the "parade of horrors" which leads to constitutional invalidation. See *City of Akron v. Akron Center for Reproductive Health, Inc.*, 103 S. Ct. at 2500. See also *infra* notes 220-22 and accompanying text.

211. This pattern of legislation is constitutional, from indications in *City of Akron v. Akron Center for Reproductive Health, Inc.*, 103 S. Ct. at 2501, sustaining ordinance language similar to most of the cited statutes.

212. ILL. ANN. STAT. ch. 38, § 81-26(6) (Smith-Hurd Supp. 1984-1985) (class B misdemeanor to fail to inform). This seems unconstitutional in light of Supreme Court comments in *City of Akron v. Akron Center for Reproductive Health, Inc.*, 103 S. Ct. at 2500 n.34.

213. TENN. CODE ANN. § 39-4-202(b)(4) (1982) (abortion in a considerable number of cases constitutes a major surgical procedure). Such a warning was invalidated in *City of Akron v. Akron Center for Reproductive Health, Inc.*, 103 S. Ct. at 2500 ("a dubious statement"; trial court expert evidence supported a conclusion that it is a minor surgical procedure. *Id.* at 2500 n.35).

214. *E.g.*, DEL. CODE ANN. tit. 24, § 1794(a)(5) (1981); FLA. STAT. ANN. § 390.025(2) (West Supp. 1984); KY. REV. STAT. § 311.729(1) (Supp. 1984); ME. REV. STAT. ANN. tit. 22, § 1599 (Supp. 1984-1985); MASS. GEN. LAWS ANN. ch. 112, § 12S (West 1983); MO. ANN. STAT. § 188.039(2)(6) (Vernon 1983); MONT. CODE ANN. § 50-20-104(3)(c) (1983); NEB. REV. STAT. § 28-326(8) (Supp. 1984); NEV. REV. STAT. § 442.253 (1983); N.D. CENT. CODE § 14-02.1-02(5)(f) (1981); 18 PA. CONS. STAT. ANN. § 3205(a)(2)(i-iii) (Purdon 1983); R.I. GEN. LAWS § 23-4.7-5(b)(1) (1984); S.C. Dep't of Health & Envtl. Control R. 61-12, § 203(C)(1) (1976); TENN. CODE ANN. § 39-4-202(b)(5) (1982). The Massachusetts statute was held constitutional in *Planned Parenthood League v. Bellotti*, 641 F.2d 1006, 1020-21 (1st Cir. 1981).

During the 1984 presidential election campaign, both major political parties agreed that education about alternatives to abortion was important. See Democratic Party Platform of 1984, 42 Cong. Q. 1747, 1767 (July 21, 1984) ("family life education pro-

services and financial aid,²¹⁵ adoption²¹⁶ and counseling.²¹⁷ In several states, public agencies supply forms and other information concerning public and private agencies available to help women if they request.²¹⁸ One state provides that a woman cannot be denied public assistance if she refuses to consent to an abortion.²¹⁹

With some hesitancy, one can assume that these requirements, standing alone, may be imposed constitutionally. The Court noted that "a State is not always foreclosed from asserting an interest in whether pregnancies end in abortion or childbirth,"²²⁰ and information about alternatives and support services appears to be as necessary for an informed selection among alternatives as information about the medical dimensions of abortion and childbirth.

The same cannot be said, however, of statutory requirements that patients be told the specifics of fetal development and characteristics. Utah has gone the farthest in this regard,²²¹ but several other states require similar information.²²² The Supreme Court voided language

grams . . . aimed at reducing the need for abortion"); Republican Party Platform of 1984, 42 Cong. Q. 2096, 2110 (Aug. 25, 1984) (commending organizations "providing positive alternatives to abortion by meeting the physical, emotional, and financial needs of pregnant women and offering adoption services where needed").

215. *E.g.*, ILL. ANN. STAT. ch. 38, § 81-23.5(1) (Smith-Hurd Supp. 1984-1985); KY. REV. STAT. § 311.729(1) (1983); ME. REV. STAT. ANN. tit. 22, § 1599 (Supp. 1984-1985); 18 PA. CONS. STAT. ANN. § 3205(a)(2)(i) (Purdon 1983) (medical assistance benefits may be available for prenatal care, childbirth and neonatal care), 3205(a)(2)(ii) (father is liable to assist in support of child, even if father has offered to pay for abortion) (Purdon 1983).

216. *E.g.*, R.I. GEN. LAWS § 23-4.7-5(b)(1) (Supp. 1984); UTAH CODE ANN. § 76-7-305(2) (Supp. 1983).

217. S.D. CODIFIED LAWS ANN. § 34-23A-10 (1977).

218. *E.g.*, ILL. ANN. STAT. ch. 38, § 81.23.5 (Smith-Hurd Supp. 1984-1985); KY. REV. STAT. § 311.729(1) (1983); MASS. GEN. LAWS ANN. ch. 112, § 12S (West 1983); 18 PA. CONS. STAT. ANN. § 3208(a)-(c) (Purdon 1983); R.I. GEN. LAWS § 23-4.7-5(a) (Supp. 1984); UTAH CODE ANN. § 76-7-305.5(1)(a) (Supp. 1983).

219. MASS. GEN. LAWS ANN. ch. 112, § 12S (West 1983). The statute was sustained as constitutional in *Planned Parenthood League v. Bellotti*, 641 F.2d 1006, 1020-21 (1st Cir. 1981). See also *infra* notes 485-89 and accompanying text.

220. *City of Akron v. Akron Center for Reproductive Health, Inc.*, 103 S. Ct. at 2500 n.33.

221. UTAH CODE ANN. § 76-7-305.5(1)(b) (Supp. 1983) requires the state department of health to provide descriptions of "physical characteristics" of normal unborn children at two-week intervals, "beginning with the fourth week and ending with the twenty-fourth week . . . accompanied by scientifically verified photographs of an unborn child" at each stage of development, including "information about physiological and anatomical characteristics, brain and heart function and the presence of external members and internal organs during the applicable stages of development."

222. *E.g.*, DEL. CODE ANN. tit. 24, § 1794(a)(3) (1981) ("[f]acts of fetal development as of the time proposed abortion is to be performed"); IDAHO CODE § 18-609 (Supp. 1984) (similar); ILL. ANN. STAT. ch. 38, § 81-23.5(2) (Smith-Hurd Supp. 1984-1985)

typical of these statutes because it "would involve at best speculation by the physician."²²³ Therefore, one may doubt that a physician or counselor constitutionally could be prosecuted for a failure to comply with legislative requirements which seem on their face to be intended to discourage free choice of abortion, and not to provide neutral information relevant to a woman's decision.

In sum, although some of the specific information required under several state laws cannot constitutionally be required of physicians, most of the individual requirements are probably valid. Nevertheless, if one stands apart and surveys the totality of information mandated in some jurisdictions, particularly Illinois, Kentucky, Missouri, Nevada, North Dakota, Pennsylvania, Tennessee and Utah, the legislative purpose seems clear—to discourage consents to abortion, a governmental motive which the Supreme Court has declared unconstitutional.²²⁴

There is one other dimension of unconstitutionality in many information statutes. Some do not specify who must impart the information,²²⁵ or allow for alternative sources to physicians.²²⁶ A number of

(probable anatomical and physiological characteristics of fetus at various gestational ages at which abortion might be performed, including relevant information concerning possibility of fetal survival); KY. REV. STAT. § 311.729(3) (1983) (same); MASS. GEN. LAWS ANN. ch. 112, § 12S (West 1983) (information about stage of development of unborn child); MO. ANN. STAT. § 188.039(2)(3) (Vernon 1983) (like Delaware); MONT. CODE ANN. § 50-20-104(3)(a) (1983) (similar); N.D. CENT. CODE § 14-02.1-02(5)(c) (1981) (similar); 18 PA. CONS. STAT. ANN. § 3202(b)(i) (Purdon 1983).

223. *City of Akron v. Akron Center for Reproductive Health, Inc.*, 103 S. Ct. at 2500 (footnote omitted). See also *Planned Parenthood Ass'n v. Ashcroft*, 655 F.2d 848, 867-68 (8th Cir. 1981), *aff'd on other grounds*, 103 S. Ct. 2517 (1983) (plurality opinion) (woman's decision was burdened insofar as anxiety and tension involved in such a decision are increased without medical justification); *Planned Parenthood League v. Bellotti*, 641 F.2d 1006, 1021-22 (1st Cir. 1981) (information not directly related to any medically relevant fact, would cause many women "emotional distress, anxiety, guilt, and in some cases increased physical pain"). There is no impediment to state regulations requiring patient counseling without specifying the content. *Birth Control Centers, Inc. v. Reizen*, 743 F.2d 352, 362-63 (6th Cir. 1984).

224. *City of Akron v. Akron Center for Reproductive Health, Inc.*, 103 S. Ct. at 2501: "By insisting upon recitation of a lengthy and inflexible list of information, Akron unreasonably has placed 'obstacles in the path of the doctor upon whom [a woman is] entitled to rely for advice in connection with her decision.'" *Id.* (quoting *Whalen v. Roe*, 429 U.S. 589, 604 n.33 (1977)).

225. *E.g.*, DEL. CODE ANN. tit. 24, § 1794(a) (1981); IND. CODE ANN. § 35-1-58.5-1(f) (Burns 1979 & Supp. 1984); MINN. STAT. ANN. § 145.412(1)(4) (West Supp. 1984); NEB. REV. STAT. § 28-326(8) (Supp. 1984); 18 PA. CONS. STAT. ANN. § 3205(a)(3) (Purdon 1983) (woman to certify in writing that she has received the information required), § 3205(a)(4) (physician must receive copy of woman's certification before performing abortion) (Purdon 1983).

226. *E.g.*, FLA. STAT. ANN. § 390.025(2) (West Supp. 1984) (covers only abortion counseling or referral agencies); IDAHO CODE § 18-609(3) (Supp. 1984); ILL. ANN. STAT. ch. 38, § 18-23.5(3) (Smith-Hurd Supp. 1984-1985); KY. REV. STAT. § 311.729(4) (1983); 18 PA. CONS. STAT. ANN. § 3205(a)(3) (Purdon 1983) (woman certifies that physician or agent has given required information); R.I. GEN. LAWS § 23-4.7-3 (Supp. 1984) (either a physician or associated personnel or authorized agents to give information); S.C. CODI-

states, however, require physicians, often on threat of criminal penalties, to communicate the information personally.²²⁷ The Supreme Court invalidated that approach in *City of Akron v. Akron Center for Reproductive Health*,²²⁸ although it confirmed that a physician cannot abdicate his or her ultimate responsibility for the medical aspects of abortion. Therefore, states can require physicians to verify that adequate counseling has been provided by qualified persons and that a patient's consent is informed.

One may also note in passing that only one state requires information to be given to spouses.²²⁹ Presently no state requires parents' or guardians' consent.²³⁰ The legitimacy of these mandates turns on the constitutionality of requiring spousal or parental consent.²³¹

5. Consent

a. General requirements.

As noted, medically indicated abortions must be consented to.²³² This means a free choice on a woman's part—freedom from any coercion.²³³ It is common to include the requirement of consent in legis-

FIED LAWS ANN. § 34-23A-10 (1977) (triggered only by a patient's request for information about counseling service agencies).

227. *E.g.*, ME. REV. STAT. ANN. tit. 22, § 1599 (Supp. 1984-1985); MO. ANN. STAT. § 188.039(2) (Vernon 1983); MONT. CODE ANN. § 50-20-106(2) (1983); NEV. REV. STAT. § 442.253 (1983); N.D. CENT. CODE §§ 14-02.1-02(5), 14-02.1-03(1) (1981); TENN. CODE ANN. § 39-4-202(b) (1982) (patient must sign form indicating physician has orally informed her); UTAH CODE ANN. § 76-7-305(2) (Supp. 1983); VA. CODE § 18.2-76 (1982).

228. 103 S. Ct. at 2501-03. The Court reasoned that consent of a woman can still be informed even though the physician has allowed another "qualified individual" to counsel her. *Id.* at 2502.

229. ILL. ANN. STAT. ch. 38, § 18-23.4 (Smith-Hurd Supp. 1984-1985).

230. A similar Missouri provision was held invalid in *Planned Parenthood Ass'n v. Ashcroft*, 655 F.2d 848, 866 (8th Cir. 1981), *aff'd on other grounds*, 103 S. Ct. 2517 (1983) (plurality opinion).

231. *See infra* notes 252-56 and accompanying text (spousal consent); *infra* notes 243-51 and accompanying text (parental consent).

232. *Planned Parenthood v. Danforth*, 428 U.S. at 65-67. *Cf. Guste v. Jackson*, 429 U.S. 399 (1977) (court should not have invalidated state consent statute as far as women generally were concerned). *See also Smith v. Bentley*, 493 F. Supp. 916, 928 (E.D. Ark. 1980).

233. That norm appears occasionally in legislation. *See, e.g.*, IOWA CODE ANN. § 707.8(3) (West Supp. 1984-1985) (procuring consent through force or intimidation a felony); 18 PA. CONS. STAT. ANN. § 3206(g) (Purdon 1983) (coercion of minor or mental incompetent); TENN. CODE ANN. § 39-4-201(b)(3) (1982) (obtain or procure abortion); UTAH CODE ANN. § 76-7-312 (1978) (coercion to obtain abortion).

The issue arises indirectly from time to time. *See, e.g.*, *People v. Pointer*, 151 Cal. App. 3d 1128, 199 Cal. Rptr. 357 (1984) (court could not require as a condition of probation following conviction of child endangerment that the defendant not conceive again; this might force an abortion when there were other methods of forestalling future

child endangerment); *Planned Parenthood Ass'n v. Department of Human Resources*, 297 Or. 562, 687 P.2d 785 (1984) (court invoked state constitutional provisions to invalidate administrative regulation limiting number of elective abortions a woman could have under public funding). *Cf. Sanchez v. Sirmons*, 121 Misc. 2d 249, 467 N.Y.S.2d 757 (Sup. Ct. 1983) (arbitration clause in a medical consent form was not binding in malpractice suit based on bungled abortion unless defendant physician established that the woman knew she was waiving the right to a jury trial; the circumstances of an abortion decision made such awareness unlikely).

A refusal to undergo an abortion cannot be asserted as a defense in a "wrongful birth" action (*see infra* note 383) based on a claim that a plaintiff had brought about the damages through her own choice. *Morris v. Frudenberg*, 135 Cal. App. 3d 23, 185 Cal. Rptr. 76 (1982); *Rivera v. State*, 94 Misc. 2d 157, 163, 404 N.Y.S.2d 950, 954 (Ct. Cl. 1978) (any interpretation of traditional doctrine which would require an abortion would be "an invasion of privacy of the grossest and most pernicious kind"). Nor is a plaintiff required to mitigate damages by undergoing a second abortion after a bungled one by a physician defendant. *Delaney v. Krafte*, 98 A.D.2d 128, 470 N.Y.S.2d 936 (1984).

A constitutional issue is inherent in statutory provisions, *e.g.*, ILL. ANN. STAT. ch. 38, §§ 81-27, -28 (Smith-Hurd Supp. 1984-1985) (physician and hospital must notify juvenile court that infant has been born and juvenile court must determine whether it has been abandoned); IND. CODE ANN. § 35-1-58.5-7(c), (d) (Burns Supp. 1984); MO. ANN. STAT. § 188.040 (Vernon 1983); MONT. CODE ANN. § 50-20-108(2) (1983); N.D. CENT. CODE § 14-02.1-03 (1981); S.D. CODIFIED LAWS ANN. § 34-23A-18 (1977) (all facts and circumstances involving birth and abortion are relevant and material evidence in parental rights termination, dependency or neglect proceedings; state department of social services may commence proceedings); TENN. CODE ANN. § 39-4-207 (1982); TEX. FAM. CODE ANN. § 15.022 (Vernon Supp. 1984) (action to terminate parental rights may be based on abortion other than to save woman's life), that after a consent has been filed and a live birth results, the child is deemed abandoned and a ward of the state unless the consent is retracted before birth occurs.

The constitutionality of such provisions appears suspect. *Cf. Freiman v. Ashcroft*, 584 F.2d 247 (8th Cir. 1978), *aff'd*, 440 U.S. 941 (1979) (court invalidated statutory requirement that physician inform patient of that consequence). The Supreme Court in *Planned Parenthood v. Danforth*, 428 U.S. at 62 n.2, found that the physician plaintiffs lacked standing to attack this portion of the Missouri statute. *See also Parness & Pritchard, supra* note 110, at 293-95.

In instances of termination of the rights of a mother, one should consider *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 27 (1981), in which the Court acknowledged that "a parent's desire for and right to 'the companionship, care, custody, and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection'." (quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)). Hence, a state which terminates that interest "will have worked a unique kind of deprivation." *Id.* "A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore, a commanding one." *Id.* Consequently, a hearing meeting the administrative due process requirements established in *Mathews v. Eldridge*, 424 U.S. 319 (1976), is a prerequisite to termination of parental rights. An automatic termination by statute, or based on presumptions of neglect resting on consents to lawful postviability abortions, does not meet that constitutional standard. *Cf. Smith v. Organization of Foster Families*, 431 U.S. 816, 847-56 (1977) (foster parents had a limited liberty interest in termination of custodial status, but state procedures amply recognized *Mathews v. Eldridge* concerns). A husband presumably would have equivalent claims.

As to putative fathers (fathers of children born outside marriage), the Court has indicated that they must be given an opportunity to develop a relationship with their children. *Lehr v. Robertson*, 103 S. Ct. 2985, 2994 (1983). Only if they do not avail themselves of such an opportunity can their claims to parental status be terminated summarily through adoption proceedings. *Id.* *See also Quilloin v. Walcott*, 434 U.S. 246 (1978). Otherwise, they have procedural protections, *Stanley v. Illinois*, 405 U.S. 645

lation,²³⁴ quite frequently with the additional mandate that a consent be in writing²³⁵ or certified.²³⁶ Consent may be dispensed with only in cases of immediate threat to a woman's life²³⁷ or health.²³⁸ Otherwise, criminal²³⁹ or civil²⁴⁰ sanctions may be pursued against those

(1972), which as a matter of equal protection must be equal to those an illegitimate child's mother enjoys. *Caban v. Mohammed*, 441 U.S. 380 (1979) (sex bias violates equal protection clause). These holdings, too, seem to preclude invocation of the above state statutes against fathers of illegitimate children.

234. *E.g.*, COLO. REV. STAT. § 18-6-101(1) (Supp. 1982) (at woman's request); IDAHO CODE § 18-609 (Supp. 1984); and § 18-610 (1979) (refusal to consent is binding irrespective of nonage or incompetency); IOWA CODE ANN. § 707.8(2) (West Supp. 1984-1985); KY. REV. STAT. § 311.726 (Supp. 1984); MINN. STAT. ANN. § 145.412(1)(4) (West Supp. 1984); N.M. STAT. ANN. § 30-5-1(C) (1984); N.Y. PENAL LAW § 125.05(3) (McKinney 1975) (abortion not justified without consent); N.D. CENT. CODE § 14-02.1-03(1) (1981); WASH. REV. CODE ANN. § 9.02.070(a) (1977).

18 PA. CONS. STAT. ANN. § 3215(f) (Purdon 1983) forbids any court, judge, executive officer, or administrative agency to issue orders, other than in instances of a medical emergency, to require abortions without express, voluntary consent, and WIS. STAT. ANN. § 66.04(1)(m) (West Supp. 1984) prohibits payment of incentive funds for abortions.

235. *E.g.*, DEL. CODE ANN. tit. 24, § 1794(a) (1981); FLA. STAT. ANN. § 390.001(4) (West Supp. 1984); MD. PUB. HEALTH CODE ANN. § 20-214(c)(1) (1982) (refusal to consent cannot be penalized); MASS. GEN. LAWS ANN. ch. 112, § 12S, and § 12Q (West 1983) (must be delivered to physician performing abortion [presumably, in referral cases]); MO. ANN. STAT. § 188.027 (Vernon 1983); MONT. CODE ANN. §§ 50-20-104(3), 50-20-106(2) (1983); NEB. REV. STAT. §§ 28-326(8), 28-327 (Supp. 1984); NEV. REV. STAT. § 442.252 (1983); OKLA. STAT. ANN. tit. 63, § 1-738(A)(2) (West 1984) (physician's report must indicate who signed consent form); OR. REV. STAT. § 435.435(1) (1983); 18 PA. CONS. STAT. ANN. § 3205(3) (Purdon 1983) (informed consent requires certification by woman that required information has been given her); R.I. GEN. LAWS § 23-4-7-2 (Supp. 1984); S.C. CODE ANN. § 44-41-10(h) (Law. Co-op. 1977) (form must be witnessed); S.D. CODIFIED LAWS ANN. § 34-23A-7 (1977); TENN. CODE ANN. § 39-4-202(a) (1982); UTAH CODE ANN. § 76-7-305(1) (1978); V.I. CODE ANN. tit. 14, § 151(b) (Supp. 1983); VA. CODE § 18.2-76 (1982).

236. Women may be required to certify they have been given the information required by statute. *See supra* notes 198-224 and accompanying text. *See, e.g.*, ME. REV. STAT. ANN. tit. 22, § 1598(1) (Supp. 1983-1984); MD. HEALTH OCC. CODE ANN. § 20-211(d) (Supp. 1982); 18 PA. CONS. STAT. ANN. § 3205(3) (Purdon 1983). A physician may be required to certify the same thing as a condition to receiving a valid consent. *See, e.g.*, MO. ANN. STAT. § 188.045 (Vernon 1983) (requires that woman shall certify in writing); MONT. CODE ANN. § 50-20-106(2) (1983).

237. *E.g.*, DEL. CODE ANN. tit. 24, § 1794(b) (1981); FLA. STAT. ANN. § 390.001(4)(c) (West Supp. 1984); IND. CODE ANN. § 35-1-58.5-2(1)(B) (Burns Supp. 1984); MINN. STAT. ANN. § 145.412(2) (West Supp. 1984) (unlawful to perform abortion on unconscious woman unless unconscious for purpose of abortion or necessary to save woman's life); MONT. CODE ANN. § 50-20-106(3) (1983); NEB. REV. STAT. § 28-327 (Supp. 1984); NEV. REV. STAT. § 442.252 (1983); S.C. CODE ANN. § 44-41-30(a) (Law. Co-op. 1977) (and unless woman has been adjudicated mentally incompetent).

238. *E.g.*, IDAHO CODE § 18-609(5) (Supp. 1984) (grounds recognized in law); ILL. ANN. STAT. ch. 38, § 38-23.2(B)(2) (Smith-Hurd Supp. 1984-1985) (medical emergency); IOWA CODE ANN. § 707.8(2) (West 1979) (life or health of pregnant woman or fetus).

239. *E.g.*, 18 PA. CONS. STAT. ANN. § 3205(c) (Purdon 1983); S.D. CODIFIED LAWS

who perform abortions.

b. Consent by minor.

A pregnant minor must consent to an abortion like her elders. This is noted specifically in some statutes,²⁴¹ subject to an emergency exception.²⁴² The bulk of litigation, however, has been generated by requirements of consent by parents or legal guardians.²⁴³

c. Consent by parent or guardian.

It has been common to require consent by both parents,²⁴⁴ one parent²⁴⁵ or a guardian²⁴⁶ before an unmarried, unemancipated minor

ANN. § 34-23A-10.2 (Supp. 1984) (and matter reported to professional disciplinary authority); UTAH CODE ANN. § 76-7-314(2) (Supp. 1983).

240. 18 PA. CONS. STAT. ANN. § 3205(d) (Purdon 1983) (physician who complies with consent provisions is not civilly liable).

241. *E.g.*, MO. ANN. STAT. § 188.027(3) (Vernon 1983) (emancipated minor must consent like adult); N.M. STAT. ANN. § 30-5-1(C) (1984) (at request of minor and parent or guardian); OKLA. STAT. ANN. tit. 63, § 2602(A)(3) (West 1984) (general consent law); 18 PA. CONS. STAT. ANN. § 3206(a) (Purdon 1983) (pregnant minor and a parent). Occasionally, a general consent law allowing minors, capable of doing so, to consent to medical techniques contains a specific exception in cases of abortion. *See, e.g.*, GA. CODE ANN. § 88-2902 (1981). That might suggest an equal protection violation, unless there is a medical basis to support the exclusion—a medical basis difficult to document in light of, *e.g.*, *Roe v. Wade*, 410 U.S. 113 (1972), and *City of Akron v. Akron Center for Reproductive Health, Inc.*, 103 S. Ct. 2481 (1983).

242. *E.g.*, MO. ANN. STAT. § 188.028(3) (Vernon 1983); NEV. REV. STAT. § 129.030(2) (1979); OKLA. STAT. ANN. tit. 63, § 2602(A)(3) (West 1984).

243. *See infra* notes 244-51 and accompanying text. *Cf.* *State v. Norflett*, 67 N.J. 268, 287-89, 337 A.2d 609, 619-20 (1975) (in prosecution against lay abortionist for contributing to delinquency of minor, a minor can manifest delinquency by consenting to abortion).

244. *E.g.*, ALASKA STAT. § 18.16.010 (1981); ARIZ. REV. STAT. ANN. § 36-2271 (Supp. 1984) (surgical consent law); ILL. ANN. STAT. ch. 38, §§ 81.51-54 (Smith-Hurd Supp. 1984-1985); KY. REV. STAT. § 311.732(1) (Supp. 1984); MASS. GEN. LAWS ANN. ch. 112, § 12S (West 1983); MINN. STAT. ANN. § 144.343(4)(b) (West Supp. 1984) (if parent or guardian authorizes abortion in writing, doctor need not comply with parental notice provision); N.D. CENT. CODE § 14-02.1-03.1(1)(a) (1981); OKLA. STAT. ANN. tit. 63, § 1-738(A)(2) (West 1984) (reporting form must indicate who signed consent, including parents).

245. *E.g.*, COLO. REV. STAT. § 18-6-101(1) (Supp. 1984); DEL. CODE ANN. tit. 24, § 1790(b)(3) (1981) (if minor not residing in household with either of parents or guardian); FLA. STAT. ANN. § 390.001(4)(a) (West Supp. 1984); ILL. ANN. STAT. ch. 38, § 81-54(3) (Smith-Hurd Supp. 1984-1985) (remaining parent if one parent has died, deserted his or her family or is unavailable); MASS. GEN. LAWS ANN. ch. 112, § 12S (West 1983) (surviving parent or divorced parent with custody); MO. ANN. STAT. § 188.028(1)(1) (Vernon 1983); N.M. STAT. ANN. § 30-5-1(C) (Supp. 1983); N.D. CENT. CODE §§ 14-02.1-03(2)(b), 14-02.1-03.1(1)(a) (1981) (for abortion after viability, a parent if living, a surviving parent or custodial parent in cases of separation or divorce); 18 PA. CONST. STAT. ANN. § 3206(a) (Purdon 1983) (one parent); R.I. GEN. LAWS § 23-4.7-6 (Supp. 1984) (one parent); S.C. CODE ANN. § 44-41-30(b), (c) (Law. Co-op. 1977) (unmarried and less than sixteen years of age or adjudicated a mental incompetent); VA. CODE § 18.2-76 (1982) (parent of woman adjudicated mentally incompetent).

246. *E.g.*, ALASKA STAT. § 18.16.010 (1981); DEL. CODE ANN. tit. 24, § 1790(b)(3) (1981); ILL. ANN. STAT. ch. 38, § 81-54(3) (Smith-Hurd Supp. 1984-1985); KY. REV. STAT.

can have an abortion. A guardian may be given the exclusive power to decide whether someone judicially determined to be mentally incompetent may have an abortion.²⁴⁷

The constitutionality of these provisions has been the object of considerable decisional law. During the first trimester of pregnancy, a state cannot impose a blanket requirement that every pregnant minor obtain the consent of a parent or guardian.²⁴⁸ A pregnant minor's consent controls if she is capable of giving it.²⁴⁹ If a minor is

§ 311.732(2) (Supp. 1984) (or person in loco parentis if no parent or guardian); MASS. GEN. LAWS ANN. ch. 112, § 12S (West 1983); MINN. STAT. ANN. § 144.343(4)(b) (West Supp. 1984) (if guardian authorizes abortion in advance, physician need not comply with parental notice requirement); MO. ANN. STAT. § 188.028(1)(1) (Vernon 1983); N.M. STAT. ANN. § 30-5-1(C) (1984); N.D. CENT. CODE §§ 14-02.1-03.1(1)(b), 14-02.1-03.1(1)(a) (1981); OKLA. STAT. ANN. tit. 63, § 1-738(2) (West 1984) (reporting form must indicate whether guardian signed consent); R.I. GEN. LAWS § 23-4.7-6 (Supp. 1984); S.C. CODE ANN. § 44-41-30(b) (Law. Co-op. 1977); WASH. REV. CODE ANN. § 9.02.070(a) (1977).

247. *E.g.*, ARK. STAT. ANN. § 41-2555 (1977); DEL. CODE ANN. tit. 24, § 1790(b)(3) (1981); FLA. STAT. ANN. § 390.001(4) (West Supp. 1983); ILL. ANN. STAT. ch. 38, § 81-54(3) (Smith-Hurd Supp. 1984-1985); KY. REV. STAT. § 311.732(1) (Supp. 1984); 18 PA. CONS. STAT. ANN. § 3206(a) (Purdon 1983); S.C. CODE ANN. § 44-41-30(c) (Law. Co-op. 1976); VA. CODE § 18.2-76 (1980).

248. *Planned Parenthood v. Danforth*, 428 U.S. at 72-75. *See also* *Bellotti v. Baird*, 443 U.S. 622 (1979) (Massachusetts statute requiring parental consultation and consent).

249. *See* *Planned Parenthood v. Danforth*, 428 U.S. at 75. *See generally* Buchanan, *The Constitution and the Anomaly of the Pregnant Teenager*, 24 ARIZ. L. REV. 553 (1982).

Danforth suggests the legal legitimacy of requiring parental consents to abortions (or denials of consent) for minor mental incompetents. 428 U.S. at 75. *See also* *Matter of Barbara C.*, 101 A.D.2d 137, 474 N.Y.S.2d 799 (1984) (hospitalized mentally-ill minor could receive abortion when parent consented; no requirement of independent judicial review).

Analogies for resolving the constitutionality and lawfulness of a guardian's or parent's decision concerning abortion probably must be drawn from the jurisprudence relating to sterilization of mental retardates. *See, e.g.*, *Buck v. Bell*, 274 U.S. 200 (1927) (Court sustained constitutionality of sterilization statute invokable against "feeble-minded" persons); *In re C.D.M.*, 627 P.2d 607, 612-13 (Alaska 1981) (court approved use of the same conditions as those established in *In re Grady*, 85 N.J. 235, 264-65, 426 A.2d 467, 482-83 (1981)); *In re Guardianship of Tulley*, 83 Cal. App. 3d 698, 146 Cal. Rptr. 266 (1978), *cert. denied sub nom.* *Tulley v. Tulley*, 440 U.S. 967 (1979) (father of a mentally-retarded woman has no statutory authority to request a sterilization order); *In re A.W.*, 637 P.2d 366 (Colo. 1981) (general parental consent statute did not allow parents to approve sterilization of a mentally-retarded child); *P.S. by Harbin v. W.S.*, 452 N.E.2d 969 (Ind. 1983) (juvenile court had power to order sterilization of mentally-retarded son with parental consent without specific enabling statute); *Wentzel v. Montgomery General Hosp.*, 293 Md. 685, 447 A.2d 1244 (1982), *cert. denied*, 459 U.S. 1147 (1985) (court has inherent parens patriae authority to entertain parental application for sterilization of incompetent minor); *In re M.K.R.*, 515 S.W.2d 467 (Mo. 1974) (juvenile court has no authority to order sterilization of minor female at parents' request); *In re Grady*, 85 N.J. 235, 426 A.2d 467 (1981) (court has inherent parens patriae jurisdiction to allow sterilization of noninstitutionalized female, at parental request, but

unmarried and unemancipated, and there is doubt whether the minor can make an informed consent to an abortion, the Court has indicated that either parental²⁵⁰ or judicial²⁵¹ consent may be required.

If state statutes recognize complete discretion on the part of emancipated (or married) minors to select abortion as the mode of terminating their pregnancies, and provide expeditious judicial proceedings to determine whether unemancipated minors are capable of choice, they are constitutional. Many states, however, have not revised their legislation to reflect the refinements expected by the Supreme Court.

d. Spousal consent.

The Supreme Court invalidated all requirements of spousal consent,²⁵² which has shifted legislative attention in most jurisdictions to spousal notification as a condition to abortion.²⁵³ Nevertheless, a few states continue to retain a requirement of spousal consent.²⁵⁴ This probably reflects a disinclination to recognize Supreme Court doc-

must find, among other things, that minor cannot understand nature and significance of sterilization, incompetency is probably permanent, incompetent person is fertile and capable of procreation); *In re Moore*, 289 N.C. 95, 221 S.E.2d 307 (1976) (court approved sterilization order for mental retardate at parents' request); *In re Guardianship of Hayes*, 93 Wash. 2d 228, 608 P.2d 635 (1980) (court has inherent power to order sterilization of mentally-incompetent person at parental request, but should not do so unless substantial medical evidence has been adduced establishing that sterilization is in the best interests of the retardate; court established a presumption against sterilization which proponents must overcome by clear, cogent and convincing evidence); *In re Guardianship of Eberhardy*, 102 Wis. 2d 539, 307 N.W.2d 881 (1981) (established public policy to allow sterilization of 22-year-old woman, incapable of consent, at insistence of parents should be matter for legislation).

250. *City of Akron v. Akron Center for Reproductive Health, Inc.*, 103 S. Ct. at 2497-98 (explaining the Court's ruling in *Bellotti*). See also *Planned Parenthood League v. Bellotti*, 641 F.2d 1006, 1011-13 (1st Cir. 1981) (court rejected due process and equal protection attacks on Massachusetts statute which required either parental consent or judicial determination that minor was competent to consent).

251. See *infra* notes 257-61 and accompanying text.

252. *Planned Parenthood v. Danforth*, 428 U.S. at 67-72. Cf. *Hagerstown Reproductive Health Servs. v. Fritz*, 295 Md. 268, 454 A.2d 846, *cert. denied*, 103 S. Ct. 3538 (1983) (court vacated as moot an appeal of a lower court injunction, issued at a husband's request, against performance of an abortion until he consented because the abortion already had been performed); *Coleman v. Coleman*, 57 Md. App. 755, 471 A.2d 1115 (1984) (husband cannot enjoin medically indicated abortion for wife). English case law adopts a similar position, although not, of course, on constitutional grounds. See *Paton v. Trustees of British Pregnancy Advisory Service*, [1978] 2 All E.R. 987, [1978] 3 W.L.R. 687.

A corollary is that the father of a child cannot defeat his duty to provide financial support for his child on the basis that he had not been given an opportunity to decide whether a fetus should be aborted, or that he had offered to pay for a first-trimester abortion. See *People ex rel. S.P.B.*, 651 P.2d 1213 (Colo. 1982) (citing authorities).

253. See *infra* notes 263-70 and accompanying text.

254. E.g., COLO. REV. STAT. § 18-6-101(1) (Supp. 1984) (abortion must be at request of woman and husband); FLA. STAT. ANN. § 390.001(4)(b) (West Supp. 1984) (written spousal consent to indicate notice and opportunity to consult; predecessor provision held unconstitutional in *Poe v. Gerstein*, 517 F.2d 787 (5th Cir. 1975), *aff'd*, 428 U.S. 901 (1976)).

trine, but serves only to impel judicial nullification. If statutes refer to spousal consent for minor married women and mental incompetents,²⁵⁵ issues of constitutionality should be resolved on the basis of parental consent in such instances.²⁵⁶

e. Judicial approval for abortions.

The Court has required that if a minor is not emancipated, a state may require either parental consent or a judicial determination in lieu of it.²⁵⁷ If there is no specific legislation, a parental consent requirement will be ruled unconstitutional.²⁵⁸ Several states have provided for such a judicial avenue.²⁵⁹

If the procedures are clear and expeditious, such legislation will be sustained as a legitimate alternative to parental consent for minors incapable of giving it.²⁶⁰ However, if a court concludes that a minor is competent to give an informed consent, it can only certify that fact, allowing the minor to exercise her *Roe v. Wade* rights. The state cannot forbid an abortion because it believes a woman should not have one. The latter determination is to be made only if the minor is not capable of consenting; denial of an abortion then must rest on a showing that abortion is inimical to her best interests.²⁶¹

6. Notice to Parents and Spouses

When most legislation requiring parental or spousal consent to

255. *E.g.*, ARK. STAT. ANN. § 41-2555 (1977); S.C. CODE ANN. § 44-41-30(c) (Law. Co-op. 1977).

256. *See supra* notes 248-51 and accompanying text.

257. *See supra* note 250.

258. *City of Akron v. Akron Center for Reproductive Health, Inc.*, 103 S. Ct. at 2498-99. *See also* *Planned Parenthood v. Ashcroft*, 103 S. Ct. 2517, 2525-26 (1983) (plurality opinion).

259. *E.g.*, ARIZ. REV. STAT. ANN. § 36-2152(B)(2) (Supp. 1984); FLA. STAT. ANN. § 390.001(4)(a) (West Supp. 1984); ILL. ANN. STAT. ch. 38, § 81-54(3) (Smith-Hurd Supp. 1984-1985); IND. CODE ANN. § 35-1-58.5-2.5 (Burns Supp. 1984); KY. REV. STAT. § 311.732(3)-(6) (Supp. 1984); MASS. GEN. LAWS ANN. ch. 112, § 12S (West 1983); MINN. STAT. ANN. § 144.343(6) (West 1984); MO. ANN. STAT. § 188.028(2) (Vernon 1983); NEB. REV. STAT. § 28-347(2) (Supp. 1984); N.D. CENT. CODE § 14-02.1-03.1(2) (1981); 18 PA. CONS. STAT. ANN. § 3206(c)-(f), (h) (Purdon 1983); R.I. GEN. LAWS § 23-4.7-6 (Supp. 1984).

260. *See generally* *Scheinberg v. Smith*, 659 F.2d 476, 480-82 (5th Cir. 1981); *Zbaraz v. Hartigan*, 584 F. Supp. 1452, 1460-62 (N.D. Ill. 1984) (procedures inadequate because there was no expedited judicial review and minor's anonymity was not protected; prefilling assistance is not required).

261. *See City of Akron v. Akron Center for Reproductive Health, Inc.*, 103 S. Ct. at 2498-99; on a requirement of good cause, *see Planned Parenthood Ass'n v. Ashcroft*, 103 S. Ct. at 2526 (plurality opinion).

abortion fell before the Court's constitutional axe, a number of states substituted requirements that parents²⁶² or spouses²⁶³ be given notice²⁶⁴ before an abortion is performed.²⁶⁵ Sometimes the same litany of information required to be given a patient²⁶⁶ must be given along with the basic notice.²⁶⁷

The Supreme Court has not yet ruled directly in a majority opinion on the constitutionality of such notice statutes. Statutes that require information to be given to parents or spouses which, if communicated to pregnant women, would place an obstacle in the way of free choice may be unconstitutional, because they are designed to increase pressures from family members against abortions.

If notice is restricted to the fact of abortion, but goes to one whose consent cannot be required constitutionally, one may ask what function it is to play. Language in some of the opinions in *H.L. v. Matheson*²⁶⁸ suggests that if a pregnant minor is not emancipated, but still a part of a family unit, a parental notice requirement promotes familial

262. *E.g.*, ARIZ. REV. STAT. ANN. § 36-2152(A) (Supp. 1984); ME. REV. STAT. ANN. tit. 22, § 1597(2) (1980); MD. PUB. HEALTH CODE ANN. § 20-103 (1982) (notice not required if minor does not live with parent or guardian and a reasonable effort to give notice is unsuccessful or if notice may lead to physical or emotional abuse of minor; physician is not civilly or criminally liable for decision not to give notice on latter basis); MINN. STAT. ANN. § 144.343(4)(c) (West 1984) (not required if minor declares she is a victim of sexual abuse as defined in § 626.556); MONT. CODE ANN. § 50-20-107(1)(b) (1983); NEB. REV. STAT. § 28-347(1) (Supp. 1984); NEV. REV. STAT. § 442.255 (1981) (if possible to notify); TENN. CODE ANN. § 39-4-202(f) (1982) (if parents cannot be located, then to agency or other individual to whom the minor's custody has been transferred).

263. *E.g.*, ILL. ANN. STAT. ch. 38, § 81-23.4(A) (Smith-Hurd Supp. 1984-1985); KY. REV. STAT. § 311.735 (1983) (within 30 days after abortion if reasonably possible); MONT. CODE ANN. § 50-20-107(1)(a) (1983) (unless husband is voluntarily separated); NEV. REV. STAT. § 442.254 (1981) (unless woman is legally separated from husband or has obtained a judicial declaration of paternity stating that a man other than the husband is father of the unborn child); R.I. GEN. LAWS §§ 23-4.8-2 (Supp. 1984) (if notice is reasonably possible), 23-4.8-3 (unnecessary if woman furnishes written statement that she has given notice to her husband, that the fetus was not fathered by the husband, that the woman is separated from her husband, or that she has filed for divorce; or husband gives physician written notice that he has been notified); UTAH CODE ANN. § 76-7-304(2) (1978).

See Note, Spousal Notification; An Unconstitutional Limitation on a Woman's Right to Privacy in the Abortion Decision, 12 HOFSTRA L. REV. 531 (1984).

264. Some statutes provide for notice by certified or registered mail if notice is not communicated orally. *See, e.g.*, ME. REV. STAT. tit. 22, § 1597(2) (1980) (if cannot notify orally or by mail, must notify state department of human services in writing of inability to give notice and of intention to perform abortion); MD. PUB. HEALTH CODE ANN. § 20-103(d) (Supp. 1983) (proof of mailing is conclusive evidence of notice); NEB. REV. STAT. § 28-347 (Supp. 1984); N.D. CENT. CODE § 14-02.1-03(1) (1981).

265. Notice statutes frequently require a 24 or 48 hour waiting period after notice before an abortion can be performed. The constitutionality of waiting periods generally is discussed *infra* notes 326-36 and accompanying text.

266. *See supra* notes 203-23 and accompanying text.

267. *E.g.*, ILL. ANN. STAT. ch. 38, § 81-23.4(A)(1) (Smith-Hurd Supp. 1984-1985); N.D. CENT. CODE § 14-02.1-03(1) (1981).

268. 450 U.S. 398 (1981).

harmony and an ability on the part of parents to help a daughter make an informed choice. Alternatively, if a minor is emancipated or alienated from her parent, a requirement of parental notice would appear to impose a burden on the minor's free choice and thus be unconstitutional.²⁶⁹ If a spousal consent requirement is unconstitutional, and notice is a preliminary to an exercise of a power to consent, one may doubt the constitutionality of a duty to inform imposed on physicians. Conversely, if the maintenance of interspousal harmony is promoted by a notice requirement, and that goal is not outweighed by its impact on a woman's free exercise of discretion under *Roe v. Wade*, there is at least an arguable basis for sustaining a spousal notice requirement.²⁷⁰

7. Grounds for Abortion

a. Incest.

Several states have continued their pre-*Wade* coverage of incest as a humanitarian basis for abortion²⁷¹ in current statutes.²⁷² Laws of this nature should be unconstitutional if they are invoked to prevent abortions otherwise medically justified under *Roe v. Wade*,²⁷³ but if

269. *Planned Parenthood Ass'n v. Ashcroft*, 655 F.2d 848, 858-59 (8th Cir. 1981), *aff'd on other grounds*, 103 S. Ct. 2517 (1983) (plurality opinion). Cf. *Planned Parenthood Ass'n v. Matheson*, 582 F. Supp. 1001 (D. Utah 1983) (requirement that notice be given minor's parents concerning provision of contraceptives invalidated as contrary to federal statutory policy and invasive of minor's privacy); Note, *The "Squeal Rule" and a Minor's Right to Privacy*, 12 HOFSTRA L. REV. 497 (1984) (discussion of federal Department of Health and Human Services proposed "squeal rule" requiring federally-funded family planning agencies to notify parents that their minor children have obtained prescription contraceptives).

270. See *Scheinberg v. Smith*, 659 F.2d 476, 482-87 (5th Cir. 1981) (remanding for a district court determination whether a husband's concern for a more than de minimis decrease in his wife's procreative potential following an abortion, outweighed the influence of a spousal notice requirement on the wife's abortion decision). Cf. *Hagerstown Reproductive Health Servs. v. Fritz*, 295 Md. 268, 454 A.2d 846, *cert. denied*, 103 S. Ct. 3538 (1983) (court vacated as moot an appeal against a lower court's issuance of an injunction of an abortion, at a husband's request, because abortion had already been performed).

271. See *supra* note 81 and accompanying text.

272. E.g., ARK. STAT. ANN. § 41-2554 (1977) (criminal statute); CAL. HEALTH & SAFETY CODE § 25951(c)(2) (West 1984), CAL. PENAL CODE § 274 (West Supp. 1984) (exempts such abortions); COLO. REV. STAT. § 18-6-101(b) (Supp. 1984) (within first 16 weeks of pregnancy; limitation held unconstitutional in *People v. Norton*, 181 Colo. 47, 507 P.2d 862 (1973)); DEL. CODE ANN. tit. 24, § 1790(a)(3)(a) (1981); IDAHO CODE § 18-608(1) (1979) (limited to first trimester); KAN. STAT. ANN. § 21-3407(2) (1981); N.M. STAT. ANN. § 30-5-1(C)(4) (1984).

273. Because they are not reported or are not within time limitations, for example. ARK. STAT. ANN. § 41-2554 (1977) (must be reported within 7 days); COLO. REV. STAT.

they legitimate abortions not based strictly on medical consideration (assuming pregnancies from such causes do not cause sufficient emotional trauma to constitute a medical ground), they probably are constitutional.²⁷⁴

b. Rape.

Rape as a humanitarian ground for abortion, recognized before 1973,²⁷⁵ continues to be acknowledged in some legislation.²⁷⁶ In some instances, the individual is subject to reporting or confirmation requirements.²⁷⁷ The constitutionality of such provisions turns on the same considerations mentioned in the context of incest as a ground for abortion.²⁷⁸

c. Physical or mental defect in child if born alive.

Abortion based on eugenic considerations was acknowledged in some states before *Roe v. Wade*,²⁷⁹ and continues today.²⁸⁰ The con-

§ 18-6-101(b) (Supp. 1983) (within first 16 weeks of pregnancy); IDAHO CODE § 18-608(1) (1979) (within first trimester).

274. This would require a consideration of whether the Court's concern in *Roe v. Wade*, 410 U.S. at 164-65, over the "potentiality of human life" translates into a restriction on abortions based other than on medical necessity. In context, however, the Court's language is a limitation on a state's power to regulate abortions following viability. Cf. the Court's language in *Harris v. McRae*, 448 U.S. 297, 325 (1980), *quoted infra* note 474 and accompanying text.

275. See *supra* note 81 and accompanying text.

276. E.g., ARK. STAT. ANN. § 41-2554 (1977); CAL. HEALTH & SAFETY CODE § 25951(c)(2) (West 1984), CAL. PENAL CODE § 274 (West Supp. 1984) (exempting such cases); DEL. CODE ANN. tit. 24, § 1790(a)(3)(b) (1981); IDAHO CODE § 18-608(1) (1979) (first trimester only; in cases of rape or felonious intercourse; all illicit intercourse with female under 16 deemed felonious intercourse); KAN. STAT. ANN. § 21-3407(2) (1981); MD. PUB. HEALTH CODE ANN. § 20-208(a)(4) (Supp. 1983); MISS. CODE ANN. § 97-3-3(1)(b) (1972); N.M. STAT. ANN. § 30-5-1(C)(3) (1978).

277. E.g., MD. PUB. HEALTH CODE ANN. § 20-208(a)(4) (Supp. 1983) (if state's attorney for county informs hospital abortion review authority in signed writing that probable cause exists to believe alleged rape occurred); N.M. STAT. ANN. § 30-5-1(C)(3) (1984) (woman must submit to special hospital board an affidavit that she has been raped and that rape has been or will be reported to appropriate law enforcement officials).

278. See *supra* notes 273-74 and accompanying text.

279. See *supra* note 80 and accompanying text.

280. E.g., ARK. STAT. ANN. § 41-2554 (1977) (grave defect); DEL. CODE ANN. tit. 24, § 1790(a)(2) (1981) (substantial risk of grave and permanent physical deformity or mental retardation); IDAHO CODE § 18-608(1) (1979) (physical or mental health, first trimester only); IOWA CODE ANN. § 707.7 (West 1979) (life or health of fetus, final trimester coverage); KAN. STAT. ANN. § 21-3407(2) (1981) (child born with physical or mental defect); MD. PUB. HEALTH CODE ANN. § 20-208(a)(3) (Supp. 1983) (substantial risk of grave and permanent physical deformity or mental retardation); N.M. STAT. ANN. § 30-5-1(C)(2) (1984) (child probably will have grave physical or mental defect). Public funds are available for abortion on this ground in Virginia. VA. CODE § 32.1-92.2 (1982) (if qualified physician certifies in writing after appropriate tests a belief that fetus will be born with gross and totally incapacitating physical deformity or mental deficiency).

stitutionality of this form of legislation turns on whether, in an obverse application of *Roe v. Wade* principles,²⁸¹ the potentiality of human life in a fetus precludes abortions on this basis if not otherwise medically indicated from the standpoint of maternal life or health.

d. Maternal life.

As discussed earlier, for many years, in almost every jurisdiction, abortions could be performed only to save the life of a pregnant woman.²⁸² Some states have continued this as the sole basis for lawful abortions;²⁸³ in some instances only in later stages of gestation.²⁸⁴ There may be no constitutional barrier to recognizing this as an exception to an aggravating factor under penal statutes when abortions are performed other than by licensed physicians in later stages of pregnancies²⁸⁵ (even granted the rarity of cases in which a layperson could properly manage abortions), or in limiting availability of public funds for abortions unless preservation of maternal life is involved.²⁸⁶ But limiting legislation of this sort is unconstitutional if invoked to prevent a woman and her physician from reaching an abortion decision within the parameters of *Roe v. Wade*. Perpetuation of such statutes can be attributed only to legislative inertia or re-

281. See *supra* note 274. For a discussion of the matter of whether others may intervene to contest a parental-physician decision not to use life support systems to preserve an infant born with serious birth defects, see *Weber v. Stony Brook Hosp.*, 60 N.Y.2d 208, 456 N.E.2d 1186, 469 N.Y.S.2d 63 (1983) (lawyer with no disclosed relationship to infant or her family could not obtain judicial authorization for surgery, overriding parental and physicians' decision not to provide extraordinary medical treatment for infant born with spina bifida and other serious complications). See also Maguire, *Can Technology Solve the Abortion Dilemma?*, 93 CHRISTIAN CENTURY 918 (Oct. 27, 1976); Smith, *Life and Death Decisions in the Nursery: Standards and Procedures for Withholding Lifesaving Treatment From Infants*, 27 N.Y.L. SCH. L. REV. 1125 (1982).

282. See *supra* note 29 and accompanying text.

283. *E.g.*, ARIZ. REV. STAT. ANN. § 13-3603 (1978); MICH. COMP. LAWS ANN. § 750.14 (1968); N.H. REV. STAT. ANN. § 585:13 (1974) (certified by two physicians to be necessary); VT. STAT. ANN. tit. 13, § 101 (1974); W. VA. CODE § 61-2-8 (1984) (good faith belief in necessity); WIS. STAT. ANN. § 940.04(5)(b) (West 1982).

284. *E.g.*, N.H. REV. STAT. ANN. § 585:13 (1974) (quick child); R.I. GEN. LAWS § 11-23-5 (1981) (quick child).

285. *E.g.*, R.I. GEN. LAWS § 11-23-5 (1981); WASH. REV. CODE ANN. § 9.02.010 (1977). A similar restriction may be imposed through judicial interpretation. See, *e.g.*, *People v. Bricker*, 389 Mich. 524, 208 N.W.2d 172 (1973).

286. *E.g.*, MINN. STAT. ANN. § 256B.02(8)(13)(a) (West 1982) (public employee health insurance plans may include abortions in which woman's life would be endangered by carrying pregnancy to term). Constitutional aspects of withholding public funding are discussed *infra* notes 462-74 and accompanying text.

luctance to acknowledge Supreme Court doctrine.²⁸⁷

e. Maternal life or health.

Several states have continued a requirement that all abortions be based on considerations of maternal life or health²⁸⁸ frequently restricted by a qualifying phrase such as "gravely impair."²⁸⁹ This form of legislation, however, is unconstitutional under *Roe v. Wade*,²⁹⁰ which makes "medical judgment" the criterion during the first trimester of pregnancy, and regulation of abortion procedures "reasonably related to maternal health" the standard during the period before viability. Only after viability does the criterion of "preservation of life or health of the mother" become valid.²⁹¹ Many states, therefore, have legislated the "life or health" standard only for abortions following viability²⁹² or after a stated number of weeks of gestation.²⁹³

The difficulty with the latter standard, however, is that, although there may have been a basis in *Roe v. Wade* for use of a time standard as an alternative to viability, the Supreme Court has rejected it in the setting of the place of performance of abortions. Viability is

287. See *supra* notes 137-50 and accompanying text.

288. *E.g.*, ALA. CODE § 13A-13-7 (1982) (criminal code); D.C. CODE ANN. § 22-201 (1981) (see also *United States v. Vuitch*, 402 U.S. 62 (1971)); KAN. STAT. ANN. § 21-3407(2) (1981); P.R. LAWS ANN. tit. 33, § 4010 (1983); TENN. CODE ANN. § 39-4-201(c)(3) (1982).

289. *E.g.*, ARK. STAT. ANN. § 41-2554 (1977); CAL. HEALTH & SAFETY CODE § 25951(c)(1) (West Supp. 1984); DEL. CODE ANN. tit. 24, § 1790(a)(4) (1981) ("substantial risk of permanent injury"); MD. PUB. HEALTH CODE ANN. § 20-208(a)(1)-(2) (Supp. 1983); N.M. STAT. ANN. § 30-5-1(C)(1) (1984); VA. CODE § 18.2-74 (1982) (substantial or irremediable impairment). The pattern for the "gravely impair" qualifier is the Uniform Abortion Act § 1(b)(2) (1972). See *Roe v. Wade*, 410 U.S. at 146 n.40 (quoting the Act).

290. 410 U.S. at 164.

291. *Id.* at 164-65. See *Coleman v. Coleman*, 57 Md. App. 755, 471 A.2d 1115 (1984) (invalidated state legislative restriction of abortions to those based on grave impairment of maternal health, rape or likelihood of a seriously deformed child).

292. *E.g.*, ILL. ANN. STAT. ch. 38, § 81-25(2) (Smith-Hurd 1977 & Supp. 1984-1985); IND. CODE § 35-1-58.5-2(3)(c) (Supp. 1984); KY. REV. STAT. § 311.780 (1983); LA. REV. STAT. ANN. § 37:1285(8) (West Supp. 1984) (third trimester or after viability); ME. REV. STAT. ANN. tit. 22, § 1598(4) (1980); MO. ANN. STAT. § 188.030(1) (Vernon 1983); MONT. CODE ANN. § 50-20-109(1)(c) (1983); NEB. REV. STAT. § 28-329 (Supp. 1984); OKLA. STAT. ANN. tit. 63, § 1-732(A) (West 1984); 18 PA. CONS. STAT. ANN. § 3210(a) (Purdon 1983); UTAH CODE ANN. § 76-7-302(3) (1978) (if child is sufficiently developed to have any reasonable possibility of survival outside womb).

293. *E.g.*, FLA. STAT. ANN. § 390.001(2) (West Supp. 1984) (third trimester); IOWA CODE ANN. § 707.7 (West 1979); MASS. GEN. LAWS ANN. ch. 112, § 12M (West 1983) (24 weeks or later); MINN. STAT. ANN. § 145.412(3) (West Supp. 1984) (potentially viable); NEV. REV. STAT. § 442.250(1)(c) (1983) (after 24th week); N.Y. PENAL LAW § 125.05(3) (McKinney 1975) (after 24 weeks); N.C. GEN. STAT. § 14-45.1(b) (1981) (after 20th week); N.D. CENT. CODE § 14-02.1-04(3) (1981) (after point at which fetus may reasonably be expected to have reached viability); S.C. CODE ANN. § 44-41-20(c) (Law. Co-op. 1976) (third trimester); S.D. CODIFIED LAWS ANN. § 34-23A-5 (1977) (after 24th week of pregnancy).

the sole acceptable criterion in that context.²⁹⁴ Hence, application of the "life or health" standard before actual viability in each pregnancy risks a declaration of unconstitutionality if physicians are prosecuted, sued or disciplined for performing medically indicated abortions in the period between the beginning of the statutorily prescribed period and viability.

f. General medical grounds.

Roe v. Wade legitimates the constitutional right of pregnant women to abortions before viability if medically indicated.²⁹⁵ Some states acknowledge the constitutional norm only indirectly by legislating specific standards following viability.²⁹⁶ Several others, however, have enacted the Supreme Court standard or an equivalent.²⁹⁷ Such legislation has no observable constitutional defect, but is superfluous.

8. Residency Requirements

A small number of states²⁹⁸ retain a residency requirement²⁹⁹ lim-

294. *City of Akron v. Akron Center for Reproductive Health, Inc.*, 103 S. Ct. at 2494-95 (the Court endorsed a viability standard over a trimester test).

295. See *Roe v. Wade*, 410 U.S. at 165-66. The medical determination may be reached in light of all attendant circumstances. See also *Colautti v. Franklin*, 439 U.S. at 387-89; *Doe v. Bolton*, 410 U.S. at 190-91.

296. *E.g.*, FLA. STAT. ANN. § 390.001(5) (West Supp. 1984) (must use professional skill to keep fetus alive if at all possible after viability); ME. REV. STAT. ANN. tit. 22, § 1598(4)(A) (1980) (criminal liability for knowing disregard of fetus viability); N.Y. PUB. HEALTH LAW § 4164 (McKinney 1977) (viable born fetus given immediate legal protection).

297. *E.g.*, GA. CODE ANN. § 16-12-141 (West Supp. 1984) (best clinical judgment that abortion is necessary); IDAHO CODE § 18-608(1) (1979) (appropriate in medical judgment based on factors including but not limited to physical, emotional, psychological or familial); ILL. ANN. STAT. ch. 38, § 81-23.1(A) (Smith-Hurd Supp. 1984-1985) (best medical judgment; first trimester only); LA. REV. STAT. ANN. § 37:1285(8.1), (9) (West Supp. 1983-1984) (unprofessional conduct to terminate pregnancy if contrary to or unnecessary in best medical judgment of physician); MASS. GEN. LAWS ANN. ch. 112, § 12L (West 1983) (best medical judgment under all attendant circumstances); NEV. REV. STAT. § 442.250(1)(b) (1983) (same); S.C. CODE ANN. § 44-41-20(a), (b) (Law. Co-op. 1976) (pursuant to professional medical judgment); S.D. CODIFIED LAWS ANN. §§ 34-23A-3, 34-23A-4 (1977) (medically indicated); TENN. CODE ANN. § 39-4-201(c)(1)-(2) (1982) (medical judgment of attending physician); UTAH CODE ANN. § 76-7-303 (1978) (concurrence of attending physician based on best medical judgment), § 76-7-304(1) (1978) (best medical judgment; must consider all facts relevant to woman's well-being including but not limited to physical, emotional and psychological health and safety, age and familial situation). Cf. WYO. STAT. § 35-6-112 (1977) (a felony to use other than accepted medical procedures to abort).

298. *E.g.*, ALASKA STAT. § 18.16.010 (1981) (30 days); ARK. STAT. ANN. § 41-2556 (1977) (four months unless life-threatening emergency); DEL. CODE ANN. tit. 24, § 1793

iting the availability of abortions. These statutes are unconstitutional.³⁰⁰ Hence, their continued presence in statute books reflects legislative inertia or unwillingness to acknowledge constitutional doctrine.

9. Place of Performance

A few states retain requirements that all abortions be performed in hospitals licensed by the state,³⁰¹ accredited by outside agencies,³⁰² or both.³⁰³ Invoked as a limitation on performance of first-trimester abortions, such restrictions violate the constitutional rights of pregnant women and their physicians.³⁰⁴ Language in *Doe v. Bolton*, however, approved a prohibition against abortions performed after the first trimester other than in a hospital. Accordingly, a lengthy roster of states has legislated an in-hospital requirement.³⁰⁵

In hindsight, reliance on Supreme Court dicta proved unfortunate, because, in 1983, the Court invalidated all statutes requiring perform-

(1981) (120 days; inapplicable if woman or spouse is employed in state, if woman is a patient of a Delaware physician, or if there is a life-threatening emergency); TENN. CODE ANN. § 39-4-201(d) (1982) (woman must prove bona fide residency; hospital records must retain supporting documentation); WASH. REV. CODE ANN. § 9.02.070(b) (1977) (90 days).

299. See *supra* notes 85-86 and accompanying text.

300. *Doe v. Bolton*, 410 U.S. at 200; *Smith v. Bentley*, 493 F. Supp. 916, 929 (E.D. Ark. 1980). Residency requirements affecting access to nonemergency hospitalization or medical care at public expense constitute an invidious classification violating equal protection and the constitutional right of interstate travel. *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 254 (1974).

301. See, e.g., ALASKA STAT. § 18.16.010(a)(1) (1981) (or hospital operated by federal government or agency); COLO. REV. STAT. § 18-6-101(1) (1978) (held unconstitutional in *People v. Norton*, 181 Colo. 47, 507 P.2d 862 (1973)); CONN. GEN. STAT. ANN. § 53-31a(c) (West Supp. 1984); WIS. STAT. ANN. § 940.04(5)(c) (West 1982) (unless emergency prevents).

302. E.g., CAL. HEALTH & SAFETY CODE § 25951(a) (West 1984) (accredited by Joint Commission on Accreditation of Hospitals [JCAH]); DEL. CODE ANN. tit. 24, § 1790(a) (1981) (accredited by nationally-recognized medical or hospital accreditation authority); N.M. STAT. ANN. § 30-5-1(C) (1984) (accredited hospital).

303. E.g., ARK. STAT. ANN. § 41-2557 (1977) (licensed by state and accredited by JCAH); KAN. STAT. ANN. § 21-3407(2)(a) (1981) (certificate of necessity for abortion to be filed in hospital licensed by state and accredited by JCAH); MD. PUB. HEALTH CODE ANN. § 20-208(a) (Supp. 1983) (state licensed and JCAH-accredited).

304. *Doe v. Bolton*, 410 U.S. at 193-95. See also *Roe v. Wade*, 410 U.S. at 163.

305. E.g., IDAHO CODE § 18-608(2)-(3) (1979) (second and third trimesters); ILL. ANN. STAT. ch. 38, § 81-24 (Smith-Hurd Supp. 1984-1985) (hospital inpatient after first trimester); KY. REV. STAT. § 311.760(2) (1983) (after first trimester, unless emergency to protect woman's life or health); LA. REV. STAT. ANN. § 37:1285(8.1) (West Supp. 1984) (after first trimester; unprofessional conduct); MASS. GEN. LAWS ANN. ch. 112, § 12Q (West 1983) (13th week or after); MO. ANN. STAT. § 188.025 (Vernon 1983) (after first 12 weeks of pregnancy); MONT. CODE ANN. § 50-20-109(1)(b) (1983) (after first three months of pregnancy); N.Y. PUB. HEALTH LAW § 4164(1) (McKinney 1977) (after 12th week, on hospital inpatient basis); N.C. GEN. STAT. § 14-45.1(b) (1981) (after 20th week); N.D. CENT. CODE § 14-02.1-04(2), (3) (1981) (after first 12 weeks of pregnancy); OKLA. STAT. ANN. tit. 63, § 1-731(B) (West 1984) (subsequent to first trimester); 18 PA. CONS. STAT. ANN. § 3209 (Purdon 1983) (after first trimester); S.C. CODE ANN. § 44-41-

ance of abortions in general hospitals from the beginning of the second trimester of pregnancy through viability.³⁰⁶ A state must allow abortions during that time to be performed in clinics and outpatient facilities as well as hospitals. Statutes so providing are constitutional.³⁰⁷ Several states have had such legislation in place for many years.³⁰⁸

A few states have provided specifically for the licensing and regulation of abortion clinics.³⁰⁹ Although the limited authority is not unanimous, licensing is constitutional as long as its attendant requirements promote maternal health and do not impose unacceptable barriers against a woman's free exercise of the right to choose abortion.³¹⁰ Requirements that designated personnel be in attend-

20(c) (Law. Co-op. 1976) (third trimester); TENN. CODE ANN. § 39-4-201(c)(2)-(3) (1982) (after three months).

On abortion services for women prisoners, see CAL. WELF. & INST. CODE § 220 (West 1984) (pregnant females in local juvenile facility may obtain lawful abortions).

306. Planned Parenthood Ass'n v. Ashcroft, 103 S. Ct. at 2520; City of Akron v. Akron Center for Reproductive Health, Inc., 103 S. Ct. at 2495-97. The requirement imposed a significant burden on women wishing abortions, in terms of costs and restricted availability of abortion services in full-service general hospitals. Medical data recognized by the Court also established that abortions can be performed safely in clinics or outpatient facilities during the second trimester to the time of viability.

307. In *Simopoulos v. Virginia*, 103 S. Ct. 2532, 2537-40 (1983), the Court sustained the constitutionality of a state requirement that second trimester abortions be performed in a hospital, defined to include clinics and outpatient facilities; the legislation comported with good medical practice. *Simopoulos* had used the saline injection system in his office and allowed the pregnant minor to go to a motel where she aborted; his criminal conviction was held valid. *Id.* at 2534-35. See also *Birth Control Centers, Inc. v. Reizen*, 743 F.2d 352, 366 (6th Cir. 1984) (invalidating state requirement that second-trimester abortions be performed at a clinic's parent hospital). *Birth Control Centers* rejected, however, an equal protection attack on a regulatory statute applicable to clinics but not to private doctor's offices where abortions might be performed; no selective enforcement was established. *Id.* at 359.

308. *E.g.*, GA. CODE ANN. § 16-12-141(b) (1982) (after first trimester); IDAHO CODE § 18-608(1) (1979) (during first trimester only); IND. CODE ANN. § 35-1-58.5-2(3) (Burns Supp. 1984); MINN. STAT. ANN. § 145.412 (West Supp. 1984) (after first trimester); NEV. REV. STAT. § 442.250(2) (1983); N.C. GEN. STAT. § 14-45.1(a) (1981) (within first 20 weeks; in hospital thereafter); S.C. CODE ANN. § 44-41-20(b)-(c) (Law. Co-op. 1976) (second trimester; in certified hospitals during third trimester); S.D. CODIFIED LAWS ANN. § 34-23A-4 (1977) (between 12th and 24th week, if hospital facilities unavailable); UTAH CODE ANN. §§ 76-7-301(3), 76-7-302(2) (1978); VA. CODE §§ 18.2-73, 18.2-74 (1982) (validated in *Simopoulos v. Virginia*, 103 S. Ct. 2532 (1983)); WASH. REV. CODE ANN. § 9.02.070(c) (1977) (may terminate elsewhere if medical emergency makes abortion immediately necessary).

309. *E.g.*, FLA. STAT. ANN. § 390.014 (West Supp. 1984); ILL. ANN. STAT. ch. 111 1/2, §§ 157-8.1 to 157-8.16 (Smith-Hurd 1977 & Supp. 1984-1985); MD. PUB. HEALTH CODE ANN. § 20-203 (1982) (abortion referral services); 18 PA. CONS. STAT. ANN. § 3207 (Purdon 1983); S.C. CODE ANN. § 44-41-70 (Law. Co-op. 1976).

310. *Baird v. Department of Pub. Health of Mass.*, 599 F.2d 1098 (1st Cir. 1979);

ance although not mandated by medical needs,³¹¹ that equipment be provided not dictated by good medical practice,³¹² or that clinic physicians maintain a hospital affiliation³¹³ have been declared unconstitutional.

One may assume a similar vulnerability in statutes prohibiting fees or compensation for abortion referrals³¹⁴ or abortion referrals for profit.³¹⁵ Administrative search provisions may also infringe patients' rights to privacy.³¹⁶ However, if regulations are otherwise con-

Florida Women's Medical Clinic v. Smith, 536 F. Supp. 1048, 1057-58 (S.D. Fla. 1982), *appeal dismissed*, 706 F.2d 1172 (11th Cir. 1983); Westchester Women's Health Org. v. Whalen, 475 F. Supp. 734 (S.D.N.Y. 1979); Fox Valley Reproductive Health Care Center v. Arft, 446 F. Supp. 1072 (E.D. Wis. 1978); Village of Oak Lawn v. Marcowitz, 86 Ill. 2d 406, 427 N.E.2d 36 (1981); Indiana Hosp. Licensing Council v. Women's Pavilion of South Bend, Inc., 420 N.E.2d 1301 (Ind. App. 1981). *Contra* Word v. Poelker, 495 F.2d 1349 (8th Cir. 1974) (facilities for first-trimester abortions); Margaret S. v. Edwards, 488 F. Supp. 181, 223-24 (E.D. La. 1980) (facilities for first-trimester abortions); Mahoning Women's Center v. Hunter, 444 F. Supp. 12, 17 (N.D. Ohio 1977), *aff'd*, 610 F.2d 456 (6th Cir. 1979), *vacated on other grounds and remanded*, 447 U.S. 918 (1980) (ordinance covering only abortion clinics denied equal protection because other surgery with equivalent medical risks could be performed in unlicensed facilities); Wright v. State, 351 So. 2d 708, 711 (Fla. 1977) (term "approved facility" unconstitutional in relation to first-trimester abortions, although it might be valid thereafter); People v. Dobbs Ferry Medical Pavillion, 33 N.Y.2d 584, 301 N.E.2d 435, 347 N.Y.S.2d 452 (1973) (terms "facility" and "clinic" in medical care facility licensing statute were overinclusive and thus unconstitutional).

Efforts to use zoning regulations targeted at abortion clinics alone constitute an impediment to exercise of *Roe v. Wade* rights. Deerfield Medical Center v. City of Deerfield Beach, 661 F.2d 328, 336-38 (5th Cir. 1981); West Side Women's Services, Inc. v. City of Cleveland, 573 F. Supp. 504 (N.D. Ohio 1983); Framingham Clinic v. Board of Southborough Selectment, 373 Mass. 279, 283, 367 N.E.2d 606, 610 (1977).

A statutory prohibition against performance of abortions at an educational facility other than to save life, ARIZ. REV. STAT. ANN. § 15-730 (1975), was sustained as constitutional in *Roe v. Arizona Bd. of Regents*, 113 Ariz. 178, 179, 549 P.2d 150, 151-52 (1976), in part because of the availability of abortion facilities elsewhere.

311. *Birth Control Centers, Inc. v. Reizen*, 743 F.2d 352, 364-65 (6th Cir. 1984); *Florida Women's Medical Clinic v. Smith*, 536 F. Supp. 1048, 1057 (S.D. Fla. 1982), *appeal dismissed*, 706 F.2d 1172 (11th Cir. 1983).

312. *Florida Women's Medical Clinic v. Smith*, 536 F. Supp. at 1056. *See also* *Birth Control Centers, Inc. v. Reizen*, 743 F.2d 352, 366 (6th Cir. 1984) (invalidating a requirement that clinic corridors be 6 feet wide, as not reasonably related to the purposes of clinic regulation).

313. *Women's Medical Center of Providence v. Cannon*, 463 F. Supp. 531, 537-38 (D.R.I. 1978) (invalidating requirement that physician performing first-trimester abortions had to have unsupervised privileges at an accessible hospital).

314. *E.g.*, KY. REV. STAT. § 311.820 (1983) (although some of the terms like "kick-backs" are probably not objectionable as long as the practice is condemned in every context; if only abortion is singled out, there is an equal protection problem); 18 PA. CONS. STAT. ANN. § 3213(b) (Purdon 1983) (at least unless all other physicians and clinics are under a similar disability).

315. *E.g.*, MD. PUB. HEALTH CODE ANN. § 20-204 (1982).

316. *Margaret S. v. Edwards*, 488 F. Supp. 181, 214-17 (E.D. La. 1980). Basic administrative search doctrine is delineated, *e.g.*, in *Donovan v. Dewey*, 452 U.S. 594, 598-606 (1981); *Michigan v. Tyler*, 436 U.S. 499 (1978) (and *see* *Michigan v. Clifford*, 104 S. Ct. 641 (1984)); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978); *United States v. Biswell*, 406 U.S. 311 (1972); *See v. Seattle*, 387 U.S. 541 (1967); *Camara v. Municipal Court*, 387 U.S. 523 (1967).

stitutional, there should be no infirmity in legislation allowing nuisance abatement proceedings against places where abortions are performed in violation of law.³¹⁷

10. Peer Approval

A few states have retained statutes requiring that all abortions be concurred in by other physicians,³¹⁸ hospital review committees³¹⁹ or both.³²⁰ The Supreme Court invalidated both requirements, at least as they pertain to first-trimester abortions.³²¹ Accordingly, legislation was approved in some jurisdictions requiring such approval in the third trimester³²² or after viability.³²³ Mandates of this sort are probably constitutional if applied after viability, because the Court by its judgment approved a requirement that a second physician be in attendance at the time of an abortion after viability.³²⁴ Between the beginning of the second trimester and viability, however, limitations of this sort are likely to be viewed as barriers to women's free choice, unless similar requirements govern other medical and surgical techniques of approximately the same seriousness. There should be no impediment to requirements that, if a consulting physician refers the case to another physician for performance of an abortion, full medi-

317. See OR. REV. STAT. § 465.110 (1983).

318. *E.g.*, ARK. STAT. ANN. § 41-2558 (1977) (three physicians); KAN. STAT. ANN. § 21-3407(2)(a) (1981) (three physicians); MISS. CODE ANN. § 97-3-3(2) (1972) (two reputable licensed physicians); WIS. STAT. § 940.04(5)(b) (West 1982) (two physicians).

319. *E.g.*, CAL. HEALTH & SAFETY CODE § 25951(b) (West 1984) (unanimous approval if no more than three licensed physicians and surgeons on staff committee); COLO. REV. STAT. § 18-6-101(1), (4) (1978) (ruled unconstitutional in *People v. Norton*, 181 Colo. 47, 507 P.2d 862 (1973)); MD. PUB. HEALTH CODE ANN. § 20-208(b)(2) (Supp. 1983) (hospital abortion review authority); N.M. STAT. ANN. § 30-5-1(C), (D) (1984) (same).

320. *E.g.*, DEL. CODE ANN. tit. 24, § 1790(a), (b) (1981) (abortion review committee plus two licensed physicians certifying necessity).

321. *Doe v. Bolton*, 410 U.S. at 195-200. See also *Smith v. Bentley*, 493 F. Supp. 916, 927-28 (E.D. Ark. 1980).

322. *E.g.*, FLA. STAT. ANN. § 390.001(2)(a)-(b) (West Supp. 1984) (two physicians); GA. CODE ANN. § 16-12-141(c) (1982); IDAHO CODE § 18-608(3) (1979) (one physician; corroborated by consulting physician); S.C. CODE ANN. § 44-41-20(c) (Law. Co-op. 1976) (one other physician); VA. CODE § 18.2-74(b) (1982) (two consulting physicians).

323. *E.g.*, MONT. CODE ANN. § 50-20-109(2)(b) (1983) (two other physicians); N.D. CENT. CODE § 14-02.1-04(3) (1981) (two other physicians).

324. This was the result in *Planned Parenthood Ass'n v. Ashcroft*, 103 S. Ct. 2517, 2532 (1983) (plurality opinion), although there was no majority opinion. The provision related to protection of live-born fetuses. See *infra* notes 347-51, 437-39 and accompanying text.

cal details be transmitted.³²⁵

11. Waiting Periods

One technique for delaying abortions is to impose waiting periods between receipt of information required to be imparted to a woman,³²⁶ her spouse³²⁷ or parent³²⁸ and performance of an abortion,³²⁹ perhaps subject to an emergency exception if an abortion must be performed to protect maternal life or, in some instances, health.³³⁰ Such requirements at times have been augmented by an ensuing waiting period between a woman's submission of a signed consent form and performance of an abortion,³³¹ again subject to an emergency exception.³³²

The Supreme Court has invalidated the latter form of waiting period,³³³ as an arbitrary, inflexible limitation without a medical basis, and a costly imposition which could require two separate trips to an

325. *E.g.*, KY. REV. STAT. § 311.723(1)(b) (1983); MASS. GEN. LAWS ANN. ch. 112, § 12R (West 1983).

326. *See supra* notes 203-28 and accompanying text.

327. *See supra* note 229 and accompanying text.

328. *See supra* note 230 and accompanying text.

329. Statutes triggered by information to pregnant women include IND. CODE § 35-1-58.5-2(d) (Burns Supp. 1984) (24-hour period between receipt of consent form and submission of signed form to physician); ME. REV. STAT. ANN. tit. 22, § 1599(1) (Supp. 1984-1985) (48 hours); MO. ANN. STAT. § 188.039(1) (Vernon 1983) (48 hours); 18 PA. CONS. STAT. ANN. § 3205(a)(2) (Purdon 1983) (24 hours); S.D. CODIFIED LAWS ANN. § 34-23A-10.1 (Supp. 1984) (24 hours); TENN. CODE ANN. § 39-4-202(d) (1982) (two-day minimum excluding day on which information was given); UTAH CODE ANN. § 76-7-305.5(2) (Supp. 1983) (24 hours if possible).

Spousal information laws imposing a waiting period include ILL. ANN. STAT. ch. 38, § 81-23.4(A)(1), (A)(2)(b) (Smith-Hurd Supp. 1984-1985) (24 hours; 72 hours if mail notice); KY. REV. STAT. § 311.735 (1983) (before or, if not possible, within 30 days after); NEV. REV. STAT. § 442.254 (1981) (24 hours if possible).

Waiting periods based on notice to parents or guardians of minor pregnant females are found in: ME. REV. STAT. ANN. tit. 22, § 1597 (1980) (24 hours; 48 hours if mail notice); MINN. STAT. ANN. § 144.343(2) (West Supp. 1984) (48 hours); NEB. REV. STAT. § 28-347(1) (Supp. 1984) (24 hours; 48 hours if mail notice); NEV. REV. STAT. § 442.255 (1981) (24 hours); N.D. CENT. CODE § 14-02.1-03(1) (1981) (24 hours; 48 hours if mail notice); TENN. CODE ANN. § 39-4-202(f) (1982) (two days minimum).

330. *E.g.*, ILL. ANN. STAT. ch. 38, § 81-23.2(A)(1) (Smith-Hurd Supp. 1984-1985); KY. REV. STAT. § 311.735 (1981); ME. REV. STAT. ANN. tit. 22, §§ 1597 (1980), 1599(1) (Supp. 1984-1985); NEB. REV. STAT. § 28-347(3) (Supp. 1984); TENN. CODE ANN. § 39-4-202(f) (1982).

331. *E.g.*, DEL. CODE ANN. tit. 24, § 1794(b) (1981) (24 hours); ILL. REV. STAT. ch. 38, § 81-23.2(A)(1) (Smith-Hurd Supp. 1984-1985) (24 hours); KY. REV. STAT. § 311.726(2) (1983) (2 hours); MASS. GEN. LAWS ANN. ch. 112, § 12S (West 1983) (24 hours); NEV. REV. STAT. § 442.252 (1983) (24 hour minimum, 30-day maximum validity of consent); N.D. CENT. CODE § 14-02.1-03(1) (1981).

332. *E.g.*, DEL. CODE ANN. tit. 24, § 1794(b) (1981); ILL. ANN. STAT. ch. 38, § 81-23.2(A)(1) (Smith-Hurd Supp. 1984-1985); S.D. CODIFIED LAWS ANN. § 34-23A-10.1 (Supp. 1984).

333. *City of Akron v. Akron Center for Reproductive Health, Inc.*, 103 S. Ct. at 2503.

abortion facility.³³⁴ Although the Court did not have before it a mandated waiting period between receipt of information and submission of a consent, its rationale in *Akron Center* seems germane, particularly in light of the Court's invalidation of several items of information intended to discourage decisions to undergo an abortion.³³⁵ Legislatures are best advised to eliminate all time-delay requirements in light of the Court's flexible, medically-oriented approach to counseling and consent.³³⁶

12. Abortion Techniques

a. General standard of care.

The Supreme Court's constitutional focus is on maternal health as the sole concern after the first trimester of pregnancy,³³⁷ based on contemporary medical standards.³³⁸ Hence, no legislative statement is required to establish positive medical standards for abortions; general licensing requirements suffice. Nevertheless, there is no constitutional defect in reaffirming, in the setting of therapeutic abortion legislation, the applicability of usual standards of professional care.³³⁹

334. The Kentucky imposition of a two-hour period might or might not run afoul of such criteria. The Nevada and North Carolina fixing of a 30-day maximum period during which consents are effective should prove valid, at least in the absence of an indication that other medical consent forms are not subject to equivalent time limitations. If only abortion consent forms are so limited, there would appear to be an invidious classification violative of equal protection.

335. See *supra* notes 221-24 and accompanying text. A 24-hour waiting time for purposes of notifying a minor's parents that a therapeutic abortion was to be performed was invalidated in *Zbaraz v. Hartigan*, 584 F. Supp. 1452, 1458-59 (N.D. Ill. 1984).

336. *City of Akron v. Akron Center for Reproductive Health, Inc.*, 103 S. Ct. at 2503: "In accordance with the ethical standards of the profession, a physician will advise the patient to defer the abortion when he thinks this will be beneficial to her. But if a woman, after appropriate counseling, is prepared to give her written informed consent and proceed with the abortion, a State may not demand that she delay the effectuation of her decision."

337. *Roe v. Wade*, 410 U.S. at 163: "It follows that, from and after [the end of the first trimester], a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health."

338. *City of Akron v. Akron Center for Reproductive Health, Inc.*, 103 S. Ct. at 2495-97. The Court concluded that the dilatation and evacuation technique for abortion could be safely performed away from a general service hospital, at least until viability, rendering a city ordinance requirement that all abortions after the first trimester be performed at a hospital an unreasonable burden on women's free choice, not justified on medical grounds.

339. See, e.g., COLO. REV. STAT. § 18-6-101(1) (1978) (licensed physician using accepted medical procedures); WYO. STAT. § 35-6-112 (1977); *Dellapena, supra* note 27, at 361-65, 411-14. To the extent, however, that more severe penalties are visited on those otherwise allowed to perform abortions who use substandard abortion techniques,

Constitutional problems arise only when statutes purport to restrict accepted medical practice.

b. Precluded techniques.

At least two states continue to forbid the use of saline amniocentesis as an abortion technique after the first trimester of pregnancy, absent a special justification.³⁴⁰ The objective is to compel use of other techniques which increase the possibility that a viable fetus might be born alive. The Supreme Court has invalidated such prohibitions as not reasonably related to maternal health, because they proscribe techniques which pose less of a risk to maternal health than those which would have to be used as an alternative.³⁴¹ Continuation of these statutes can only be attributed to a legislative unwillingness to bow to Supreme Court mandate. Essentially, they are dead letters as to enforceability.

There appears to be no constitutional objection to a legislative restatement of the Court's doctrine requiring medical personnel to use all reasonable medical procedures to enhance the chance of a live birth of a viable fetus if they are consistent with maternal health.³⁴² Only if maternal health were relegated to a subordinate status would there be a constitutional problem.³⁴³

c. Testing requirements.

Two states require blood typing and Rh₀-testing before an abortion

there may be an equal protection problem or a manifestation of disproportionality of punishment to offense, violative of the eighth amendment. On the latter, see *Solem v. Helm*, 103 S. Ct. 3001 (1983).

340. ILL. ANN. STAT. ch. 38, §§ 81-29, and 81-26(6) (Smith-Hurd Supp. 1984-1985) (if there is a reasonable medical certainty that an abortion technique will cause pain to fetus which use of anaesthetic or an analgesic will prevent or alleviate, physician must inform woman of the technique which will forestall pain); KY. REV. STAT. § 311.770 (1983). Cf. WYO. STAT. § 35-6-103 (1977) (physician is not intentionally to terminate viability of infant prior to, during or following abortion).

341. *Planned Parenthood Ass'n v. Danforth*, 428 U.S. at 78-79: "Moreover, as a practical matter, [the proscription] forces a woman and her physician to terminate her pregnancy by methods more dangerous to her health than the method outlawed." See also Note, *Criminal Liability of Physicians: An Encroachment on the Abortion Right*, 18 AM. CRIM. L. REV. 591, 604-05 (1981).

342. E.g., FLA. STAT. ANN. § 390.001(5) (West Supp. 1984); IDAHO CODE § 18-608(3) (1979); ILL. ANN. STAT. ch. 38, § 81-26(3)-(5) (Smith-Hurd Supp. 1984-1985); MASS. GEN. LAWS ANN. ch. 112, § 120 (West 1983) (unless technique would create greater risk of death or serious bodily harm to mother at time of abortion or subsequently during future pregnancy; *query*, are the qualifiers constitutional under *Danforth*, 428 U.S. at 81-84?); MO. REV. STAT. § 188.030(a) (Vernon 1983); NEB. REV. STAT. § 28-330 (Supp. 1984); OKLA. STAT. ANN. tit. 63, § 1-734(C) (West 1984); 18 PA. CONS. STAT. ANN. § 3210(b) (Purdon 1983); UTAH CODE ANN. § 76-7-307 (1978).

343. On required protection of live-born fetuses in the context of abortion, see *infra* notes 347-51, 437-39 and accompanying text.

may be performed.³⁴⁴ To the extent such a requirement applies to second-trimester abortions before viability (and perhaps the stage of viability), when survival after live birth is medically impossible, it is probably unconstitutional under the Supreme Court's doctrine that all limitations on abortion be supported by current medical practice standards and paramount concerns for maternal health. If, in contrast, such legislation is interpreted to govern only those stages of pregnancy when live fetal birth is a medical possibility, there is probably no impermissible barrier to an unfettered abortion decision and its effectuation.

d. Attending physician.

Statutes occasionally require a second physician to be present when a viable fetus is aborted.³⁴⁵ The Supreme Court has sustained such a legislative condition to abortion.³⁴⁶ Its rationale, as far as can be gleaned from the judgmental majority's serial opinions, was that such a requirement reasonably relates to preservation of the life or health of a live-born fetus, without detrimental consequences to maternal health.

13. Status of Infants, Fetuses and Fetal Tissue

a. Live-born infants.

There is no need for special statutes confirming that viable fetuses born alive are persons entitled to the full protection of civil and criminal law. Those who terminate human life, whether neonate or of greater duration, whether intentionally, recklessly, or with criminal negligence, may be prosecuted for murder or manslaughter, and incur wrongful death liability. Nevertheless, some statutes confirm long-established general legal principles in the setting of abortion legislation by providing a definition of human life³⁴⁷ or confirming a

344. MASS. GEN. LAWS ANN. ch. 112, § 12R (West 1983); S.D. CODIFIED LAWS § 34-23A-6 (1977).

345. *E.g.*, MO. REV. STAT. § 188.030(3) (Vernon 1983); N.Y. PUB. HEALTH LAW § 4164(1) (1977) (after 20th week of pregnancy); N.D. CENT. CODE § 14-02.1-05 (1981); OKLA. STAT. ANN. tit. 63, § 1-732(E) (West 1984); 18 PA. CONS. STAT. ANN. § 3210(c) (Purdon 1983).

346. *Planned Parenthood Ass'n v. Ashcroft*, 103 S. Ct. 2517, 2521-22, 2532 (1983) (five Justices concurring in separate opinions).

347. *See supra* notes 184-85 and accompanying text. TEX. FAM. CODE ANN. § 12.05(b) (Vernon Supp. 1984) provides alternative medical standards by which live birth is to be determined.

duty, usually enforced by criminal penalties,³⁴⁸ to care for fetuses born alive.³⁴⁹ Other provisions, perhaps reflecting difficult proof problems in establishing beyond a reasonable doubt the independent human existence of a fetus/child, mandate a special obligation to safeguard fetal life during abortion processes.³⁵⁰ These are seemingly constitutional as long as, expressly or through judicial interpretation, the protection of maternal life or health takes priority over the preservation of fetal life.³⁵¹

b. Experimentation involving fetuses.

Quite a number of states have prohibited experimentation with, and research on, embryos and fetuses before³⁵² and after³⁵³ abor-

348. See *infra* notes 437-39 and accompanying text.

349. *E.g.*, CAL. HEALTH & SAFETY CODE § 25955.9 (West 1984); DEL. CODE ANN. tit. 24, § 1795(a) (Supp. 1982); GA. CODE ANN. § 16-12-141(c) (1982) ("if capable of meaningful or sustained life"); IND. CODE § 35-1-58.5-7 (West 1984); IOWA CODE § 707.10 (1979); LA. REV. STAT. ANN. §§ 14:87.5 and 37:1285(28) (West Supp. 1984) (taking life of viable fetus aborted alive is a basis for license revocation); ME. REV. STAT. ANN. tit. 22, § 1594 (1980); MASS. GEN. LAWS ANN. ch. 112, § 12P (West 1983); MINN. STAT. ANN. § 145.415 (West Supp. 1984); MONT. CODE ANN. § 50-20-108(1) (1983); NEB. REV. STAT. § 28-330 (Supp. 1984); N.Y. EXEC. LAW § 291(3) (McKinney 1982); N.Y. PUB. HEALTH LAW § 4164(2) (McKinney 1977); N.D. CENT. CODE § 14.02.1-08 (1981); OKLA. STAT. ANN. tit. 63, § 1-734(A), (C) (West 1984); 18 PA. CONS. STAT. ANN. §§ 3202(b)(3), 3212(b) (Purdon 1983); R.I. GEN. LAWS § 11-9-18 (Supp. 1984); S.D. CODIFIED LAWS ANN. § 34-23A-16.1 (1977); TENN. CODE ANN. § 39-4-206(a) (1982); TEX. FAM. CODE ANN. § 12.05(a) (Vernon Supp. 1984); WYO. STAT. § 35-6-104 (1977).

350. *E.g.*, IDAHO CODE § 18-608(3) (1979); ILL. REV. STAT. ch. 38, §§ 81-24 (Smith-Hurd Supp. 1984-1985) (measures for life support for fetus must be available and utilized if there is clearly visible evidence of viability), 81-26(3) (1984); IOWA CODE § 707.7 (1979); KY. REV. STAT. § 311.780 (1983); LA. REV. STAT. ANN. § 14:87.1 (West 1974); MASS. GEN. LAWS ANN. ch. 112, § 12P (West 1983) (must have life-support equipment, as defined by state department of public health, in room where abortion is performed); NEB. REV. STAT. § 28-325(3) (1979); OKLA. STAT. ANN. tit. 63, § 1-734(C) (West 1974) (all reasonable measures to preserve life of child alive when partially or totally removed from uterus as long as such measures do not create a significant danger to woman's life or health); TENN. CODE ANN. § 39-4-206(a) (1982) (however, extraneous life support measures need not be attempted if it can be determined through amniocentesis or medical observation that a fetus is severely malformed); TEX. REV. CIV. STAT. ANN. art. 4512.5 (Vernon 1976) (during parturition, destroying vitality or life if child would have been born alive); UTAH CODE ANN. § 76-7-308 (1981); VA. CODE § 18.2-74(c)(1982); WYO. STAT. § 35-6-103 (1977).

The Tennessee exception is obviously based on eugenic considerations. See *supra* notes 8-9, 80 and accompanying text.

See also the discussion of requirements that attending physicians be present during abortions during viability, *supra* notes 345-46 and accompanying text.

351. See *supra* notes 338-44 and accompanying text.

352. *E.g.*, ARIZ. REV. STAT. ANN. § 36-2302(A) (Supp. 1984); FLA. STAT. ANN. § 390.001(6) (West Supp. 1984); ILL. REV. STAT. ch. 38, § 81-26(3) (Smith-Hurd Supp. 1984-1985); LA. REV. STAT. ANN. § 14:87.2 (West 1974); ME. REV. STAT. ANN. tit. 22, § 1593 (1980); OKLA. STAT. ANN. tit. 63, § 1-735(B) (West 1984); 18 PA. CONS. STAT. ANN. § 3216(a) (Purdon 1983); UTAH CODE ANN. § 76-7-310 (1978); WYO. STAT. § 35-6-115 (persons consenting to, aiding or abetting traffic in viable aborted children commit a felony).

353. *E.g.*, ARIZ. REV. STAT. ANN. § 36-2302(A) (Supp. 1984); CAL. HEALTH & SAFETY

tions, and on stillborn³⁵⁴ and live-born³⁵⁵ infants. Exceptions, however, are provided to cover acts done to advance fetal³⁵⁶ or maternal³⁵⁷ health, and for pathological examinations.³⁵⁸ Traffickers in fetal or neonate tissue for such purposes may be penalized.³⁵⁹ Limited authority sustains the constitutionality of such provisions.³⁶⁰

c. Tissue analysis.

Several states require that pathological examinations be performed on dead fetuses and on removed fetal tissue,³⁶¹ or at least contem-

CODE § 25956 (West 1984) (exempting public or private educational institutions); FLA. STAT. ANN. § 390.001(6) (West Supp. 1984); ILL. REV. STAT. ch. 38, § 81-32 (Smith-Hurd Supp. 1984-1985); IND. CODE ANN. § 35-1-58.5-6 (Burns 1979); ME. REV. STAT. ANN. tit. 22, § 1593 (1980); MASS. GEN. LAWS ANN. ch. 112, § 12J(a) (West 1983); MICH. COMP. LAWS ANN. § 333.2688(1) (West 1980); MINN. STAT. ANN. § 145.422 (West Supp. 1984); NEB. REV. STAT. § 28-346 (1979); N.D. CENT. CODE § 14-02.2-01 (1981); OKLA. STAT. ANN. tit. 63, § 1-735 (West 1984); 18 PA. CONS. STAT. ANN. § 3216 (Purdon 1983); S.D. CODIFIED LAWS ANN. 34-23A-17 (1977); TENN. CODE ANN. § 39-4-208(a) (1982) (including photography); WYO. STAT. § 35-6-115 (1977).

354. *E.g.*, N.D. CENT. CODE § 14-02.2-02 (1981); 18 PA. CONS. STAT. ANN. § 3216(b) (Purdon 1983).

355. *E.g.*, ILL. REV. STAT. ch. 38, § 81-26 (Smith-Hurd Supp. 1984-1985) (written consent from one parent in instances of stillbirth or fetal death not resulting from abortion); LA. REV. STAT. ANN. § 14:87.2 (West 1974); MINN. STAT. ANN. § 145.422 (West Supp. 1984); MO. ANN. STAT. § 188.037 (Vernon 1983); MONT. CODE ANN. § 50-20-108(3) (1983); NEB. REV. STAT. § 28-346 (1979); N.D. CENT. CODE § 14-02.2-01 (1981).

356. *E.g.*, FLA. STAT. ANN. § 390.001(6) (West Supp. 1984) (protection of life or health); ILL. REV. STAT. ch. 38, § 81-26 (Smith-Hurd Supp. 1984-1985) (protection of life or health); LA. REV. STAT. ANN. § 14:87.2 (West 1974) (life and health of live-born child; preserve life or improve health of embryo or fetus); MINN. STAT. ANN. § 145.422 (West Supp. 1984) (protect life or health); MO. ANN. STAT. § 188.037 (Vernon 1983) (same); MONT. CODE ANN. § 50-20-108(3) (1983) (same); NEB. REV. STAT. § 28-346 (1979) (same); OKLA. STAT. ANN. tit. 63, § 1-735(A) (West 1984) (unless therapeutic to child or unborn child); 18 PA. CONS. STAT. ANN. § 3216(a) (Purdon 1983) (life or health of child); UTAH CODE ANN. § 76-7-310 (1978) (allowed when, in a physician's best medical judgment, a technique should be used to test for genetic defects).

357. *E.g.*, ARIZ. REV. STAT. ANN. § 36-2302(A) (Supp. 1984) (strictly necessary to diagnose disease or condition in mother, if abortion was performed because of that disease or condition).

358. *E.g.*, MASS. GEN. LAWS ANN. ch. 112, § 12J(a)(II) (West 1983); MICH. COMP. LAWS ANN. § 333.2688(1) (West 1980); N.D. CENT. CODE § 14-02.2-02(1) (1981); OKLA. STAT. ANN. tit. 63, § 1-735(B) (West 1984). *See infra* note 441.

359. *E.g.*, IND. CODE § 35-1-58.5-6 (1979) (transporting fetus out-of-state); ME. REV. STAT. ANN. tit. 22, § 1593 (1980); NEB. REV. STAT. § 28-342 (1979); N.D. CENT. CODE § 14-02.2-02 (1981).

360. *Margaret S. v. Edwards*, 488 F. Supp. 181, 219-21 (E.D. La. 1980). *See also Destro, supra* note 27, at 1315-16; Note, *Ethical Standards for Fetal Experimentation*, 43 FORDHAM L. REV. 547 (1975).

361. *E.g.*, ILL. REV. STAT. ch. 38, § 83-32 (1977); MO. ANN. STAT. § 188.047 (Vernon 1983); 18 PA. CONS. STAT. ANN. § 3214(c) (Purdon 1983); S.D. CODIFIED LAWS ANN.

plate that such examinations may properly be conducted.³⁶² The Supreme Court has sustained the constitutionality of such a requirement,³⁶³ apparently because tissue examinations are an incident to surgical techniques, and do not impose a special economic hardship on women desiring abortions.

d. Disposition of fetal remains.

Some states have legislated with reference to the disposition of fetal remains, sometimes through specific criminal legislation,³⁶⁴ and sometimes by recognizing the need for administrative regulations on the matter.³⁶⁵ The Supreme Court invalidated a criminal statute requiring physicians to ensure that fetal remains be "disposed of in a humane and sanitary manner," on grounds of vagueness and indefiniteness.³⁶⁶ Arguably, a purely administrative law approach is not vulnerable as long as residual criminal penalties are not provided.

14. Records and Reports

With the recognition of therapeutic abortions came a concern for documentation of the fact of and medical grounds for abortion.³⁶⁷ Since 1973, such requirements have become the norm. Physician and hospital records may have to reflect consents³⁶⁸ and information

§ 34-23A-19(3) (1977) (if facility is equipped to complete pathology reports); UTAH CODE ANN. §§ 76-7-309 (1978), 76-7-313(8) (1978 & Supp. 1983).

362. *E.g.*, IND. CODE ANN. § 35-1-58.5-5(8) (Burns 1979) (physician's report to include results of pathological examination, if performed); OHIO REV. CODE ANN. § 3701.341(3) (Page 1980) (public health council to adopt rules concerning pathological reports following abortions).

363. *Planned Parenthood Ass'n v. Ashcroft*, 103 S. Ct. at 2522-25, 2532. There was no majority opinion.

364. *E.g.*, N.D. CENT. CODE § 14-02.1-09 (1981) (physician performing abortion).

365. *E.g.*, FLA. STAT. ANN. §§ 390.001(7), 390.012(1)(e) (West Supp. 1984); ILL. REV. STAT. ch. 38, § 81-32 (Smith-Hurd Supp. 1984-1985) (no exploitation of aborted fetus or tissue); MINN. STAT. ANN. § 145.423(3) (West Supp. 1984) (child born alive and dying after birth to be disposed of according to general statutes governing human burials); N.Y. PUB. HEALTH LAW § 4164(4) (McKinney 1977) (similar); OHIO REV. CODE ANN. § 3701.341(4) (Page 1980) (public health council to adopt rules relating to humane disposition of products of human conception); WYO. STAT. § 35-6-109 (1977) (state board of health to prescribe rules and regulations for disposal of bodies, tissues, organs and parts of unborn child, human fetus or aborted human embryo).

366. *City of Akron v. Akron Center for Reproductive Health, Inc.*, 103 S. Ct. at 2503-04. *Cf. Feminist Women's Health Center, Inc. v. Philibosian*, 157 Cal. App. 3d 1076, 203 Cal. Rptr. 918 (1984) (district attorney could not contract for private interment of fetuses with Roman Catholic religious services without violating the first amendment prohibition against establishment of religion).

367. *See supra* notes 100-02 and accompanying text.

368. *E.g.*, IDAHO CODE § 18-611 (1979) (discretionary); IND. CODE § 35-1-58.5-2(d) (Burns Supp. 1984); NEV. REV. STAT. § 442.252 (1983) (as well as marital status and age); R.I. GEN. LAWS §§ 23-4.7-5, 23-4.8-3(d) (1984); UTAH CODE ANN. § 76-7-313 (1978).

given to patients,³⁶⁹ as well as data of purely medical significance.³⁷⁰ In addition, physicians and institutions are expected to submit statistical information³⁷¹ or detailed information about each abortion.³⁷² The contents of reports may be left for determination through administrative regulation or provision of state reporting forms.³⁷³ Most legislation reflects the Supreme Court's concern³⁷⁴ over patient pri-

369. *E.g.*, IND. CODE ANN. §§ 35-1-58.5-1(f), 35-1-58.5-2 (Burns Supp. 1984); R.I. GEN. LAWS § 23-4.7-5 (1984).

370. *E.g.*, ILL. REV. STAT. ch. 38, §§ 81-25(3), 81-29 (1983); IND. CODE §§ 35-1-58.5-2(3)(c), 35-1-58.5-3 (Burns Supp. 1984); MO. REV. STAT. § 188.052 (Vernon 1983); NEV. REV. STAT. § 442.250(3) (1983); N.Y. PUB. HEALTH LAW § 4164(3) (McKinney 1977) (life sustaining efforts for viable fetus born alive); N.D. CENT. CODE § 14-02.1-07 (1981); OKLA. STAT. ANN. tit. 63, §§ 1-732(B)-(D), 1-738, 1-739 (West 1984); R.I. GEN. LAWS § 23-4.7-4 (1984) (medical emergency requiring immediate abortion).

Some statutes require medical records to be retained for a specified time. *See, e.g.*, MO. REV. STAT. § 188.060 (Vernon 1983) (7 years); NEV. REV. STAT. § 442.256 (1981) (consents and information documentation retained at least 5 years); N.D. CENT. CODE § 14-02.1-07(1)(a) (1981) (7 years); OKLA. STAT. ANN. tit. 63, § 1-739 (West 1984) (7 years). Courts disagree as to whether these are unreasonable requirements burdening therapeutic abortion decisions. *Compare* Planned Parenthood League v. Bellotti, 641 F.2d 1006, 1018 (1st Cir. 1981) (constitutional), *with* Margaret S. v. Edwards, 488 F. Supp. 181, 213-14 (E.D. La. 1980) (burdensome requirement attached only to abortion case records).

371. *E.g.*, ARK. STAT. ANN. § 82-516 (Supp. 1983); DEL. CODE ANN. tit. 24, § 1790(c) (1981); GA. CODE ANN. § 16-12-141(d) (1982); KAN. STAT. ANN. § 65-445 (1981); KY. REV. STAT. § 213.055 (1983); MD. PUB. HEALTH CODE ANN. § 20-208(c) (Supp. 1983); N.M. STAT. ANN. § 24-14-18 (1981); N.Y. PUB. HEALTH LAW § 4164(3) (McKinney 1977); N.C. GEN. STAT. § 14-45.1(c) (1981); N.D. CENT. CODE § 14-02.1-07 (1981); 18 PA. CONS. STAT. ANN. § 3124(e)-(f) (Purdon 1983); UTAH CODE ANN. § 26-2-23(3) (1984); VA. CODE § 32.1-264 (1982).

372. *E.g.*, CAL. HEALTH & SAFETY CODE §§ 429.50(3) (West 1979), 25955.5 (West 1984); ILL. ANN. STAT. ch. 38, § 81-30 (Smith-Hurd Supp. 1984-1985); IND. CODE ANN. § 35-1-58.5-3 (Burns Supp. 1984); MASS. GEN. LAWS ANN. ch. 112, § 12R (West 1983); MICH. COMP. LAWS ANN. § 333.2835 (West 1980); MO. ANN. STAT. § 188.052 (Vernon 1983); NEB. REV. STAT. § 28-343 (Supp. 1984); 18 PA. CONS. STAT. ANN. § 3214(a) (Purdon 1983); P.R. LAWS ANN. tit. 24, § 232 (1979); S.D. CODIFIED LAWS ANN. § 34-23A-19 (1977); TENN. CODE ANN. § 39-4-201(c)(3) (1982); UTAH CODE ANN. § 76-7-313 (1978 & Supp. 1983).

373. *E.g.*, CAL. HEALTH & SAFETY CODE § 25955.5 (West 1984); KY. REV. STAT. § 211.027 (1983); ME. REV. STAT. ANN. tit. 22, § 1596(2) (1980); MINN. STAT. ANN. § 145.413 (West Supp. 1984); MONT. CODE ANN. § 50-20-106(2) (1981); NEV. REV. STAT. § 442.260(2) (1981); OHIO REV. CODE ANN. § 3701.341(2) (Page 1980) (public health council to adopt rules relating to abortion reporting forms); OKLA. STAT. ANN. tit. 63, § 1-738 (West 1984); P.R. LAWS ANN. tit. 24, § 234 (1979); S.C. CODE ANN. § 44-41-60 (Law. Co-op. Supp. 1983); WYO. STAT. § 35-6-107 (1977).

374. *Planned Parenthood v. Danforth*, 428 U.S. at 80: reporting and record-keeping requirements are constitutional as long as they "properly respect a patient's confidentiality and privacy." Despite the latter reservation, some courts have held that the names of patients and physicians reported to government offices become public records accessible under freedom of information laws. *See, e.g.*, *State ex rel. Stephan v. Harder*, 230 Kan. 573, 641 P.2d 366 (1982); *Minnesota Medical Ass'n v. State*, 274

vacy by requiring the names of patients³⁷⁵ and at times physicians³⁷⁶ to be kept confidential, subject perhaps to a possibility of disclosure through court order.³⁷⁷ Hospitals also may be required to report to authorities cases of complications apparently flowing from abortions.³⁷⁸

Reporting and record-maintenance requirements are constitutional as long as they are not abused or overdone to the point where they accomplish an unacceptable burden on exercise of constitutional right to abortion.³⁷⁹ For the most part, state laws appear to respect that qualification. However, Illinois, Nevada, Oklahoma, Pennsylvania and Utah, for example, decree such detailed requirements or tie report contents to matters of consent and information (some of which are unconstitutional in isolation), that one may doubt they are consonant with the Supreme Court's concerns.

15. Sanctions

Many of the details regarding therapeutic abortion practice are found outside criminal codes. Nevertheless, supplementary criminal penalties may well be provided,³⁸⁰ in addition to criminal penalties

N.W.2d 84 (Minn. 1978). Cf. *Schulman v. New York City Health & Hosps. Corp.*, 38 N.Y.2d 234, 342 N.E.2d 501, 379 N.Y.S.2d 702 (1975) (reporting requirement sustained in absence of indications that identification information was leaked or made available to other governmental agencies for illegitimate purposes). If harassing use is made of information obtained by members of the public, release would seem to infringe through public action the privacy rights of patients and their physicians in the exercise of federal constitutional rights.

375. *E.g.*, ARK. STAT. ANN. § 82-516(c) (Supp. 1983); CAL. HEALTH & SAFETY CODE § 25955.5 (West 1984); DEL. CODE ANN. tit. 24, § 1790(c) (1981); GA. CODE ANN. § 16-12-141(d) (1984); KAN. STAT. ANN. § 65-445 (1981); ME. REV. STAT. ANN. tit. 22, § 1596(2) (1980); MD. PUB. HEALTH CODE ANN. § 20-208(c) (Supp. 1983); MICH. COMP. LAWS ANN. § 333.2835 (West 1980); MINN. STAT. ANN. § 145.413 (West Supp. 1984); MO. ANN. STAT. §§ 188.055(2), 188.070 (Vernon 1983); NEB. REV. STAT. § 28-343(10) (Supp. 1984); N.M. STAT. ANN. § 24-14-18(B) (1981); N.C. GEN. STAT. § 90-14(2) (Supp. 1983); N.D. CENT. CODE § 14.02.1-07(2)(a) (1981); 18 PA. CONS. STAT. ANN. § 3214(a) (Purdon 1983) (patient identification); S.C. CODE ANN. § 44-41-60 (Law. Co-op. 1976); S.D. CODIFIED LAWS ANN. § 34-23A-19 (1976); TENN. CODE ANN. § 68-3-505 (1983) (but some means of identification must be used in case further information is needed); UTAH CODE ANN. § 76-7-313 (1978 & Supp. 1983); WYO. STAT. § 35-6-108 (1977).

376. *E.g.*, NEB. REV. STAT. § 28-343 (Supp. 1984); N.M. STAT. ANN. § 24-14-18(B) (1981); 18 PA. CONS. STAT. ANN. 3214(e)(2) (Purdon 1983) (unique identifying number to be substituted for physician's name). See, however, the decisions cited *supra* at note 374.

377. *E.g.*, GA. CODE ANN. § 16-12-141(d) (West 1984) (shall be available to district attorney of circuit in which hospital or health facility is located); ILL. ANN. STAT. ch. 38, § 81-30 (Smith-Hurd Supp. 1984-1985); KY. REV. STAT. § 213.055(7) (1983); NEB. REV. STAT. § 28-343(10) (Supp. 1984); P.R. LAWS ANN. tit. 24, § 233 (1979) (except as furnished to judges, prosecutors or police or peace officers for proper action).

378. *E.g.*, ILL. ANN. STAT. ch. 38, § 81-30.1 (Smith-Hurd Supp. 1984-1985); MINN. STAT. ANN. § 145.413(2) (West Supp. 1984); NEV. REV. STAT. § 422.265 (1981); 18 PA. CONS. STAT. ANN. § 3214(g)-(h) (Purdon 1983).

379. *Planned Parenthood v. Danforth*, 428 U.S. at 79-81.

380. *E.g.*, ALASKA STAT. § 18.16.010(b) (1981); ILL. ANN. STAT. ch. 38, § 81-31a

attached to nontherapeutic abortions.³⁸¹ In general, the former are directed at medical personnel who fail to conform to statutory requirements, while the latter have laypersons as their targets. In addition, participation in criminal abortions is usually a basis for professional discipline.³⁸² Wrongful death liability also may be confirmed specifically in abortion legislation.³⁸³

(Smith-Hurd Supp. 1984-1985); ME. REV. STAT. ANN. tit. 22, § 1598(4) (1980); MD. PUB. HEALTH CODE ANN. § 20-210 (1983); MASS. GEN. LAWS ANN. ch. 112, § 12N (West 1983); MINN. STAT. ANN. § 145.412(4) (West Supp. 1984); NEV. REV. STAT. § 442.257 (1981); N.D. CENT. CODE § 14-02.1-04(4) (1981); S.D. CODIFIED LAWS ANN. § 22-17-5 (1979); TENN. CODE ANN. § 39-4-201(b) (1982); UTAH CODE ANN. § 76-7-314 (1978); WASH. REV. CODE ANN. § 9.02.070 (1977); WYO. STAT. § 35-6-110 (1977).

381. See *infra* notes 411-18 and accompanying text.

382. *E.g.*, ALASKA STAT. § 08.64.380(3)(A) (1982); ILL. ANN. STAT. ch. 38, § 81-31 (Smith-Hurd Supp. 1984-1985); KAN. STAT. ANN. §§ 65-2837(b)(5) (Supp. 1983) (healing arts), 65-2912(f) (Supp. 1983) (physical therapist); LA. REV. STAT. ANN. § 37:1285(8)-(9) (West Supp. 1984); ME. REV. STAT. ANN. tit. 32, § 3282(5)(A) (1980); MD. PUB. HEALTH CODE ANN. § 14-504(24) (Supp. 1984); MINN. STAT. ANN. §§ 147.021(h), 147.101 (West Supp. 1984); MISS. CODE ANN. § 73-25-29(5) (Supp. 1983); MO. ANN. STAT. § 188.065 (Vernon 1983); NEB. REV. STAT. § 71-148(6) (1981); NEV. REV. STAT. § 630.306(4) (1983) (physician), § 632.320(6)(b) (1983) (nurse); § 633A.100(1)(i) (1983) (naturopath); N.J. STAT. ANN. §§ 45:9-16(c) (medicine, surgery or chiropractic), 45:10-9 (midwifery) (West 1978); N.M. STAT. ANN. §§ 61-10A-5(A) (osteopathic physician's assistant), 61-6-14(B)(1) (Supp. 1984) (medicine and surgery); N.C. GEN. STAT. § 90-14(2) (Supp. 1983); N.D. CENT. CODE § 43-17-31(2) (Supp. 1983); OKLA. STAT. ANN. tit. 59, § 509(1) (West Supp. 1984); 18 PA. CONS. STAT. ANN. § 3219 (Purdon 1983); R.I. GEN. LAWS § 23-4.7-7 (1984) (failure to obtain consents is unprofessional conduct); S.D. CODIFIED LAWS ANN. § 36-4-30(1) (Supp. 1984); TENN. CODE ANN. §§ 63-6-214(6) (1982) (medicine and surgery), 63-9-111(6) (Supp. 1983) (osteopathic physicians); TEX. REV. CIV. STAT. ANN. art. 4495b, § 3.08(14) (Vernon Supp. 1984); UTAH CODE ANN. §§ 58-12-36(1) (1974 & Supp. 1983) (medicine), 58-12-7(1) (Supp. 1983) (osteopathy); VA. CODE § 54-317(1) (1982); WASH. REV. CODE ANN. §§ 18.36.140(1) (1978) (drugless healer), 18.50.100 (Supp. 1984) (midwifery), 18.57.170(1) (Supp. 1984) (osteopathy), 18.72.030(2) (Supp. 1984) (physician).

If abortion is not specified, convicted abortionists can be disciplined on the basis of their criminal record. See, *e.g.*, MICH. COMP. LAWS ANN. § 333.16221(b)(v) (West 1980); N.H. REV. STAT. ANN. § 329:17(VI)(d), (j) (Supp. 1983); P.R. LAWS ANN. tit. 26, § 52(b) (Supp. 1984); VT. STAT. ANN. tit. 26, § 1354(3) (Supp. 1984). On constitutional requirements of administrative due process governing professional discipline, see *Withrow v. Larkin*, 421 U.S. 35 (1975).

383. This usually is aimed at failure to preserve the lives of live-born fetuses. See, *e.g.*, ILL. ANN. STAT. ch. 70, § 2.2 (Smith-Hurd Supp. 1984-1985); IND. CODE ANN. § 35-1-58.5-7(c) (Burns Supp. 1984); ME. REV. STAT. ANN. tit. 22, § 1594 (1980); NEV. REV. STAT. § 442.270(2) (1981); TENN. CODE ANN. § 39-4-206(c) (1982); UTAH CODE ANN. § 78-11-24 (Supp. 1984).

On the traditional refusal to consider a fetus a human being with a consonant right to sue for prenatal injuries persevering after live birth, see *Roe v. Wade*, 410 U.S. at 161-62. Cf. MONT. CODE ANN. § 41-1-103 (1983) ("A child conceived but not yet born is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth."). Precedent conflicts as to whether a wrongful death action may be maintained for injuries after viability which result in a stillbirth, although a majority of jurisdictions appear to allow such litigation. See, *e.g.*, *Shirley v.*

16. Conscience Exception

The legalization of medically indicated abortions, which had begun to emerge before 1973 in some states, necessitated protective legisla-

Bacon, 154 Ga. App. 203, 267 S.E.2d 809 (1980); *Chrisafogeorgis v. Brandenburg*, 55 Ill. 2d 368, 304 N.E.2d 88 (1973); *O'Neil v. Morse*, 385 Mich. 130, 188 N.W.2d 785 (1971); *Ryan v. Beth Israel Hosp.*, 96 Misc. 2d 816, 409 N.Y.S.2d 681 (N.Y. Sup. Ct. 1978) (guardian ad litem not allowed to maintain action which was an effort to attack a lawful abortion); *Libbee v. Permanente Clinic*, 268 Or. 258, 518 P.2d 636 (1974) (summarizing authorities to date of opinion). If the fetus is not viable, such an action seems not to be allowed. *See, e.g., Toth v. Goree*, 65 Mich. App. 296, 237 N.W.2d 297 (1975). If a viable fetus is born alive and expires after even a short existence, a wrongful death action will be allowed. *See, e.g., Group Health Ass'n v. Blumenthal*, 295 Md. 104, 453 A.2d 1198 (1983); *Weiler & Catton, supra* note 168, at 651-55; *Special Project, supra* note 27, at 152-55.

A now-repealed statute allowing the parents of a fetus aborted in noncompliance with abortion statutes to maintain a wrongful death action against a physician who performed the abortion was held unconstitutional as an unacceptable burden on the woman's and physician's abortion decision. *Doe v. Rampton*, 366 F. Supp. 189, 193 (D. Utah 1973) (three-judge court).

Courts generally rule out homicide criminality based on acts causing stillbirths. *See, e.g., People v. Greer*, 79 Ill. 2d 103, 402 N.E.2d 203 (1980); *Hollis v. Commonwealth*, 652 S.W.2d 61 (Ky. 1983); *State v. Brown*, 378 So. 2d 916 (La. 1979); *People v. Guthrie*, 97 Mich. App. 226, 293 N.W.2d 775 (1980), *appeal denied*, 417 Mich. 1006, 334 N.W.2d 616 (1983); *State v. Amaro*, 448 A.2d 1257 (R.I. 1982). The same result is decreed if a crime of assault is charged based on injury to a fetus in a woman's uterus. *Love v. State*, 450 So. 2d 1191 (Fla. Dist. Ct. App. 1984) (prosecution charged "aggravated assault of fetus"; court ruled that "person" in statute does not include a fetus). If a fetus is born alive and then dies, however, a contrary conclusion is appropriate. *See, e.g., People v. Bolar*, 109 Ill. App. 3d 384, 440 N.E.2d 639 (1982) (defendant properly convicted of reckless homicide as drunken driver of car which struck car in which pregnant woman was riding, necessitating a caesarean section).

Because of the legitimacy of contraception and abortion, some parents have sued because bungled techniques have resulted in birth of defective children. *See, e.g., Robak v. United States*, 658 F.2d 471 (7th Cir. 1981) (rejecting argument that, because case facts arose in 1972 before *Roe v. Wade*, an abortion would have been unavailable to a mother suffering rubella and the government should not be liable under the Federal Tort Claims Act); *Morris v. Frudensfeld*, 135 Cal. App. 3d 23, 185 Cal. Rptr. 76 (1982); *Fulton-Dekalb Hosp. Author. v. Graves*, 252 Ga. 441, 314 S.E.2d 653 (1984); *Jones v. Malinowski*, 299 Md. 257, 473 A.2d 429 (1984) (court not required to instruct jury that woman could have had an abortion); *Schroeder v. Perkel*, 87 N.J. 53, 432 A.2d 834 (1981) (pediatricians treated first child for four years without diagnosing cystic fibrosis until mother was eight months pregnant with second child); *Delaney v. Krafte*, 98 A.D.2d 128, 470 N.Y.S.2d 936 (1984) (plaintiff not required to mitigate damages by undergoing later abortion); *Speck v. Finegold*, 497 Pa. 77, 439 A.2d 110 (1981); *Certification re Harbeson v. Harbeson*, 98 Wash. 2d 460, 656 P.2d 483 (1983). However, recoveries do not extend to the costs of rearing a healthy child to maturity. *See, e.g., Flowers v. District of Columbia*, 478 A.2d 1073 (D.C. 1984) (bungled sterilization); *Morse v. Soffer*, 101 A.D.2d 856, 476 N.Y.S.2d 170 (1984) (defective abortion); *Delaney v. Krafte*, 98 A.D.2d 128, 470 N.Y.S.2d 936 (defective abortion); *McKernan v. Aasheim*, 102 Wash. 2d 411, 687 P.2d 850 (1984) (defective sterilization).

See generally Parness & Pritchard, supra note 110, at 257, 270-75; Stoutamire, *Effect of Legalized Abortion on Wrongful Life Actions*, 9 FLA. ST. U.L. REV. 137 (1981); *Warren, supra* note 17, at 51-55; *Weiler & Catton, supra* note 168, at 651-55; Note, *Genetic Screening, Eugenic Abortion, and Roe v. Wade: How Viable is Roe's Viability Standard?*, 50 BROOKLYN L. REV. 113, 137-41 (1983); Note, *Wrongful Birth in the Abortion Context—A Critique of Existing Case Law and a Proposal for Future Actions*, 53 DEN.

tion for institutions and medical professionals whose religious, ethical or moral beliefs foreclosed their participation in abortion practice.³⁸⁴ These statutes are nearly universal today. A number of states allow all hospitals,³⁸⁵ including publicly operated facilities,³⁸⁶ to refuse to

L.J. 501 (1976); Comment, *Wrongful Life: Birth Control Spawns a Tort*, 13 J. MAR. L. REV. 401 (1980).

UTAH CODE ANN. § 78-11-25 (Supp. 1983) states that a failure or refusal to prevent a live birth is not a defense in any action and is not to be considered in awarding damages or child support, or in imposing a penalty in any action. *Speck v. Finegold*, 497 Pa. 77, 439 A.2d 110 (1981), disallowed a so-called wrongful life action, but there is contrary authority. See, e.g., *Procanik v. Cillo*, 97 N.J. 339, 478 A.2d 755 (1984) (doctor failed to detect rubella in mother and to advise her to undergo an abortion; damages affirmed for extraordinary medical expenses); *Rivera v. State*, 94 Misc. 2d 157, 404 N.Y.S.2d 950 (Ct. Cl. 1978); *Certification re Harbeson v. Parke-Davis, Inc.*, 98 Wash. 2d 460, 656 P.2d 483 (1983) (citing authorities). See generally *Parness & Pritchard*, *supra* note 110, at 275-81; *Warren*, *supra* note 17, at 55-57 (wrongful life).

Precedent allowing wrongful death actions based on the deaths of women resulting from improperly performed abortions, observable before 1973, *Wolcott v. Gaines*, 225 Ga. 373, 169 S.E.2d 165 (1969); *Martin v. Hardesty*, 91 Ind. App. 239, 163 N.E. 610 (1928); *True v. Older*, 227 Minn. 154, 34 N.W.2d 700 (1948); *Milliken v. Heddesheimer*, 110 Ohio St. 381, 144 N.E. 264 (1924); *Androws v. Coulter*, 163 Wash. 429, 1 P.2d 320 (1931) (only for negligent aftercare, not an abortion itself), clearly remains valid today, although the availability of therapeutic abortions and the low risk rate for previability abortions has caused such litigation to drop from sight.

On malpractice liability in abortion cases before *Roe v. Wade*, see *Richey v. Darling*, 183 Kan. 642, 331 P.2d 281 (1958); *Lembo v. Donnell*, 117 Me. 143, 103 A. 11 (1918); *Henrie v. Griffith*, 395 P.2d 809 (Okla. 1964). After 1973, there has been no basis to treat abortion-related medical malpractice actions differently from all other such actions, at least if the abortion was lawful. See, e.g., *Salinetto v. Nystrom*, 341 So. 2d 1059 (Fla. Dist. Ct. App. 1977) (no negligence in x-raying pregnant accident victim who did not know she was pregnant; pathologist report after abortion showed fetus already dead); *Byrne v. Pilgrim Medical Group, Inc.*, 187 N.J. Super. 386, 454 A.2d 920 (1982) (husband allowed wages lost in caring for wife, to amount which would have been necessary to pay professional attendant); *S.R. v. City of Fairmont*, 280 S.E.2d 712 (W. Va. 1981) (state long-arm statute gave plaintiff ability to sue Pennsylvania facility for failure to provide proper care following lawful abortion there). Compare *Reno v. D'Javid*, 55 A.D.2d 876, 390 N.Y.S.2d 421, *aff'd*, 42 N.Y.2d 1040, 369 N.E.2d 766, 399 N.Y.S.2d 210 (1977) (no malpractice action is allowed arising from unlawful abortion which woman solicited, on principle that she could not profit from an illegal act in which she had participated).

384. See *supra* notes 104-05 and accompanying text; *Isaacs*, *supra* note 115, at 77-78; *Warren*, *supra* note 17, at 34-38. On the recognition of the conscience exception under the English Abortion Act, 1967, § 4, see *Royal College of Nursing v. Dep't of Health & Social Security*, [1981] A.C. 800 (H.L.).

385. E.g., ALASKA STAT. § 18.16.010(a) (1981); ARIZ. REV. STAT. ANN. § 36-2151 (Supp. 1984); ARK. STAT. ANN. § 41-2560(b) (1977); COLO. REV. STAT. § 18-6-104 (1978); DEL. CODE ANN. tit. 24, § 1791(b) (1981); FLA. STAT. ANN. § 390.001(8) (West Supp. 1984); GA. CODE ANN. § 16-12-142 (1982); IDAHO CODE § 18-612 (1979); ILL. ANN. STAT. ch. 111 1/2, § 87-9 (Smith-Hurd 1977); IND. CODE ANN. § 16-10-1.5-8 (Burns 1983); KAN. STAT. ANN. § 65-444 (1981); ME. REV. STAT. ANN. tit. 22, § 1591 (1980); MD. PUB. HEALTH CODE ANN. § 20-214(b) (1982); MASS. GEN. LAWS ANN. ch. 112, § 12I (West 1983), ch. 272, § 21B (West Supp. 1984) (private hospitals and facilities); MINN. STAT.

allow abortions or admit patients for the purpose of abortion. There is no constitutional infirmity in granting a conscience exception to public facilities.³⁸⁷ A few states, however, limit the conscience exemption to private or religious institutions.³⁸⁸ Hospitals cannot be held civilly liable³⁸⁹ or denied public subsidies³⁹⁰ because of refusals

ANN. §§ 145.414, 62D.20 (West Supp. 1984) (health maintenance organizations); NEB. REV. STAT. § 28-337 (1979); N.J. STAT. ANN. § 2A:65A-2 (West Supp. 1984); N.M. STAT. ANN. § 30-5-2 (1984); N.C. GEN. STAT. § 14-45.1(f) (1981); N.D. CENT. CODE § 23-16-14 (1978); Tenn. Code Ann. §§ 39-4-204, 39-4-205 (1982); VA. CODE § 18.2-75 (1982); WASH. REV. CODE ANN. § 9.02.080 (1977); WIS. STAT. ANN. § 140.42(1) (West 1974).

386. *E.g.*, KY. REV. STAT. § 311.800(1) (1983) (public), (3) (Supp. 1984) (religious or private); MO. ANN. STAT. § 197.032 (Vernon 1983) (public or private); OHIO REV. CODE ANN. § 4731.91 (Page 1977) (public or private).

387. *Poelker v. Doe*, 434 U.S. 880 (1977) (public hospitals may refuse to allow therapeutic abortions even though they subsidize childbirths).

388. *E.g.*, CAL. HEALTH & SAFETY CODE § 25955(c) (West 1984) (religious or non-profit); MONT. CODE ANN. § 50-20-111(1) (1983) (private hospital or health care facility); OKLA. STAT. ANN. tit. 63, § 1-741(A) (West 1984); S.C. CODE ANN. § 44-41-40 (Law. Co-op. 1976) (private or nongovernmental hospital or clinic); S.D. CODIFIED LAWS ANN. §§ 34-23A-14, 34-23A-15 (1977) (public hospitals cannot adopt policy excluding or denying admissions for abortions); TEX. REV. CIV. STAT. ANN. art. 4512.7, § 2 (Vernon Supp. 1984) (private hospitals); UTAH CODE ANN. § 76-7-306(2) (1978) (private or denominational hospital not required to admit patients for abortions); WYO. STAT. § 35-6-105 (1977) (private institutions).

Doe v. Bridgeton Hosp. Ass'n, 71 N.J. 478, 366 A.2d 641 (1976), *cert. denied*, 433 U.S. 914 (1977), interpreted state law to prohibit private, nonprofit, nonsectarian hospitals from closing their facilities to first-trimester abortions. *See also* the case on remand, 160 N.J. Super. 266, 389 A.2d 526 (1978) (state decision unaffected by United States Supreme Court decisions in *Maher*, *Beal* and *Poelker* (discussed *infra* notes 462-69 and accompanying text)).

The European Court of Justice has recognized that medical facilities in one member state can refuse abortions for visiting workers, authorized by another member state, if abortion is prohibited in the competent institution's own nation. *Bestuur van het Algemeen Ziekenfonds Drenthe-Platteland v. G. Pierele* (Case 182/78), [1979] E.C.R. 1977, 1990.

389. *E.g.*, ALASKA STAT. § 18.16.010(a) (1981); ARK. STAT. ANN. § 41-2560(b) (1977); CAL. HEALTH & SAFETY CODE § 25955(a) (West 1984); COLO. REV. STAT. § 18-6-104 (Supp. 1978); DEL. CODE ANN. tit. 24, § 1791(b) (1981); GA. CODE ANN. § 16-12-142 (1982); IDAHO CODE § 18-612 (1979); ILL. ANN. STAT. ch. 38, § 81-33 (Smith-Hurd Supp. 1984-1985); KAN. STAT. ANN. § 65-443 (Supp. 1983); KY. REV. STAT. § 311.800(5)(a) (1983); ME. REV. STAT. ANN. tit. 22, § 1591 (1980); MD. PUB. HEALTH CODE ANN. § 20-214(b)(2)(i) (Supp. 1984); MASS. GEN. LAWS ANN. ch. 112, § 12I (West 1983); MINN. STAT. ANN. § 145.414 (West Supp. 1984); MO. ANN. STAT. § 197.032(1) (Vernon 1983); MONT. CODE ANN. § 50-20-111(1) (1983); NEB. REV. STAT. § 28-337 (1979); N.J. STAT. ANN. § 2A:65A-3 (West Supp. 1984); N.Y. CIV. RIGHTS LAW § 79i (McKinney 1976); OHIO REV. CODE ANN. § 4731.91(d) (Page 1977); OKLA. STAT. ANN. tit. 63, § 1-741(A) (West 1984); 18 PA. CONS. STAT. ANN. § 3213(d) (Purdon 1983); R.I. GEN. LAWS § 23-17-11 (1979); S.C. CODE ANN. § 44-41-40 (Law. Co-op. 1976); S.D. CODIFIED LAWS ANN. § 34-23A-14 (1977); UTAH CODE ANN. § 76-7-306(1) (1978); VA. CODE § 18.2-75 (1982); WIS. STAT. ANN. § 140.42(2) (West 1974); WYO. STAT. § 35-6-105 (1977).

Several jurisdictions reject invocation of the hospital conscience exemption in cases of emergency. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 25955(d) (West 1984) (or in instances of spontaneous abortion); FLA. STAT. ANN. § 390.001(9) (West Supp. 1984) (inapplicable to induced labor); S.C. CODE ANN. § 44-41-40 (Law. Co-op. 1976) (emergency admittance).

390. *E.g.*, MONT. CODE ANN. § 50-20-111(4) (1983); 18 PA. CONS. STAT. ANN. § 2313(d) (Purdon 1983).

to allow abortions, although they may be required to notify patients beforehand of their policies.³⁹¹

The private right of conscience is usually delineated in terms of religious, moral, ethical or professional scruples,³⁹² but may be left unrestricted.³⁹³ Most frequently, conscientious objectors are required to file a written statement of objection.³⁹⁴ In some jurisdictions that burden is not specifically imposed.³⁹⁵

Laws may be drafted simply to allow the conscience exception to any person,³⁹⁶ or may designate physicians,³⁹⁷ nurses,³⁹⁸ or other

391. *E.g.*, ILL. ANN. STAT. ch. 38, § 81-33 (Smith-Hurd Supp. 1984-1985); NEB. REV. STAT. § 28-337 (1979); OR. REV. STAT. § 435.485(1) (1983) (physician to advise patient); WYO. STAT. § 35-6-105 (1977).

392. *E.g.*, ARIZ. REV. STAT. ANN. § 36-2151 (1974); CAL. HEALTH & SAFETY CODE § 25955(a) (West 1984); COLO. REV. STAT. § 18-6-104 (1978); FLA. STAT. ANN. § 390.001(8) (West Supp. 1983); GA. CODE ANN. § 16-12-142 (1982); IDAHO CODE § 18-612 (1979); IND. CODE ANN. § 16-10-3-2 (Burns 1983); KY. REV. STAT. § 311.800(4) (1983); MASS. GEN. LAWS ANN. ch. 112, § 12I (West 1983); MO. ANN. STAT. § 197.032 (Vernon 1983); MONT. CODE ANN. § 50-20-111(2) (1983); NEV. REV. STAT. § 632.475(1) (1979); N.M. STAT. ANN. § 30-5-2 (1984); N.Y. CIV. RIGHTS LAW § 79i (McKinney 1976); N.C. GEN. STAT. § 14-45.1(e) (1981); 18 PA. CONS. STAT. ANN. § 3203 (Purdon 1983); R.I. GEN. LAWS § 23-17-11 (1979); UTAH CODE ANN. § 76-7-306(1) (1978); VA. CODE § 18.2-75 (1982); WIS. STAT. ANN. § 140.42(1) (West 1974).

393. *E.g.*, ALASKA STAT. § 18.16.010 (1981); ARK. STAT. ANN. § 41-2560(a) (1977); ILL. ANN. STAT. ch. 38, § 81-33 (Smith-Hurd Supp. 1984-1985) ("conscience"); KAN. STAT. ANN. § 65-443 (1981); ME. REV. STAT. ANN. tit. 11, § 1591 (1980); MD. PUB. HEALTH CODE ANN. § 20-214(a) (1983); MINN. STAT. ANN. § 145.42 (West Supp. 1984); NEB. REV. STAT. § 28-338 (1979); N.J. STAT. ANN. § 2A:65A-1 (West Supp. 1984); N.D. CENT. CODE § 23-16-14 (1978); OHIO REV. CODE ANN. § 4731.91 (Page 1977); OKLA. STAT. ANN. tit. 63, § 1-741(B) (West 1984); OR. REV. STAT. § 435.485(1) (1983); S.C. CODE ANN. § 44-41-50(a) (Law. Co-op. 1976); S.D. CODIFIED LAWS ANN. § 34-23A-13 (1977); TENN. CODE ANN. § 39-4-204 (1982); TEX. REV. CIV. STAT. ANN. art. 4512.7, § 1 (Vernon Supp. 1984); WASH. REV. CODE ANN. § 9.02.080 (1977); WYO. STAT. § 35-6-106 (1977).

The conscience exemption may not be invoked in emergency situations. *See, e.g.*, FLA. STAT. ANN. § 390.001(9) (West Supp. 1984) (induced labor); IOWA CODE ANN. § 146.1 (West Supp. 1984); NEV. REV. STAT. § 632.475(3) (1979); OKLA. STAT. ANN. tit. 63, § 1-741(C) (West 1984).

394. *E.g.*, ARIZ. REV. STAT. ANN. § 36-2151 (1974); CAL. HEALTH & SAFETY CODE § 25955(a) (West 1984); COLO. REV. STAT. § 18-6-104 (1978); GA. CODE ANN. § 16-12-142 (1982); IDAHO CODE § 18-612 (1979); ILL. ANN. STAT. ch. 38, § 81-33 (Smith-Hurd Supp. 1984-1985); KY. REV. STAT. § 311.800(5) (1983); MASS. GEN. LAWS ANN. ch. 112, § 12I (West 1983); NEV. REV. STAT. § 632.475 (1983); N.Y. CIV. RIGHTS LAW § 79i (McKinney 1976); 18 PA. CONS. STAT. ANN. § 3213(d) (Purdon 1983); S.C. CODE ANN. § 44-41-50(a) (Law. Co-op. 1976); VA. CODE § 18.2-75 (1982); WIS. STAT. ANN. § 140.42(1) (West 1974).

395. *E.g.*, FLA. STAT. ANN. § 390.001(8) (West Supp. 1984); IND. CODE ANN. § 16-10-3-2 (Burns 1982); IOWA CODE ANN. § 146.1 (West Supp. 1984); MINN. STAT. ANN. § 145.42 (West Supp. 1984); N.M. STAT. ANN. § 30-5-2 (1984); N.D. CENT. CODE § 23-16-14 (1978); OR. REV. STAT. § 435.485 (1983); UTAH CODE ANN. § 76-7-306 (1978).

396. *E.g.*, ARK. STAT. ANN. § 41-2560(a) (1977); COLO. REV. STAT. § 18-6-104 (1978); DEL. CODE ANN. tit. 24, § 1791(a) (1981); FLA. STAT. ANN. § 390.001(8) (West Supp. 1984); GA. CODE § 16-12-142 (1982); IOWA CODE ANN. § 146.1 (West Supp. 1984-1985);

hospital, clinical or medical office personnel.³⁹⁹ Those who invoke their personal conscience rights cannot be held criminally⁴⁰⁰ or civilly⁴⁰¹ liable, or subjected to administrative penalties,⁴⁰² or to disci-

KAN. STAT. ANN. § 65-443 (1981); MD. PUB. HEALTH CODE ANN. § 20-214(a)(2) (Supp. 1983); MINN. STAT. ANN. § 145.42 (West Supp. 1984); NEB. REV. STAT. § 28-338 (1979); N.J. STAT. ANN. § 2A:65A-1 (West Supp. 1984); N.Y. CIV. RIGHTS LAW § 79i(1) (McKinney 1976); OKLA. STAT. ANN. tit. 63, § 1-741(B) (West 1984); VA. CODE § 18.2-75 (1982); WYO. STAT. § 35-6-106 (1977).

397. *E.g.*, CAL. HEALTH & SAFETY CODE § 25955(a) (West 1984); FLA. STAT. ANN. § 390.001(8) (West Supp. 1983); IDAHO CODE § 16-612 (1979); ILL. ANN. STAT. ch. 38, § 81-33 (Smith-Hurd Supp. 1984-1985); IND. CODE ANN. § 16-10-3-2 (Burns 1983); KY. REV. STAT. § 311.800(5)(b) (1983); ME. REV. STAT. ANN. tit. 22, § 1591 (1980); MASS. GEN. LAWS ANN. ch. 112, § 12I (West 1983); MINN. STAT. ANN. § 145.42 (West Supp. 1984); MO. ANN. STAT. § 197.032(1) (Vernon 1983); N.C. GEN. STAT. § 14-45.1(e) (1981); N.D. CENT. CODE § 23-16-14 (1978); OR. REV. STAT. § 435.485(1) (1983); 18 PA. CONS. STAT. ANN. § 3213(d) (Purdon 1983); R.I. GEN. LAWS § 23-17-11 (1979); S.C. CODE ANN. § 44-41-50 (Law. Co-op. 1976); S.D. CODIFIED LAWS ANN. § 34-23A-12 (1977); TENN. CODE ANN. § 39-4-204 (1982); TEX. REV. CIV. STAT. ANN. art. 4512.7, § 1 (Vernon Supp. 1984); UTAH CODE ANN. § 76-7-306 (1978); WASH. REV. CODE ANN. § 9.02.080 (1977); WIS. STAT. ANN. § 140.42(1) (West 1974).

398. *E.g.*, CAL. HEALTH & SAFETY CODE § 25955(a) (West 1984); IDAHO CODE § 16-612 (1979); KY. REV. STAT. § 311.800(5)(b) (1983); ME. REV. STAT. ANN. tit. 22, § 1591 (1980); MINN. STAT. ANN. § 145.42 (West Supp. 1984); MO. ANN. STAT. § 197.032(1) (Vernon 1983); NEV. REV. STAT. § 632.475 (1979); N.C. GEN. STAT. § 14-45.1(e) (1981); N.D. CENT. CODE § 23-16-14 (1978); 18 PA. CONS. STAT. ANN. § 3213(d) (Purdon 1983); S.C. CODE ANN. § 44-41-50 (Law. Co-op. 1976); S.D. CODIFIED LAWS ANN. § 34-23A-12 (1977); TEX. REV. CIV. STAT. ANN. art. 4512.7, § 1 (Vernon Supp. 1984); WASH. REV. CODE ANN. § 9.02.080 (1977). *See* Durham, Wood & Condie, *Accommodation of Conscientious Objection to Abortion: A Case Study of the Nursing Profession*, 1982 B.Y.U. L. REV. 253.

399. *E.g.*, ARIZ. REV. STAT. ANN. § 36-2151 (1974); CAL. HEALTH & SAFETY CODE § 25955(a) (West 1984); FLA. STAT. ANN. § 390.001(8) (West Supp. 1984); IDAHO CODE § 16-612 (1979); IND. CODE ANN. § 16-10-3-2 (Burns 1983); KY. REV. STAT. § 311.800(5)(b) (1983); ME. REV. STAT. ANN. tit. 22, § 1591 (1980); MASS. GEN. LAWS ANN. ch. 112, § 12I (West 1983); MINN. STAT. ANN. § 145.42 (West Supp. 1984); NEV. REV. STAT. § 632.475 (1979); N.M. STAT. ANN. § 30-5-2 (1984); N.D. CENT. CODE § 23-16-14 (1978); OR. REV. STAT. § 435.485(2) (1983); 18 PA. CONS. STAT. ANN. § 3213(d) (Purdon 1983); R.I. GEN. LAWS § 23-17-11 (1979); S.C. CODE ANN. § 44-41-50 (Law. Co-op. 1976); S.D. CODIFIED LAWS ANN. § 34-23A-12 (1977); TEX. REV. CIV. STAT. ANN. art. 4512.7, § 1 (Vernon Supp. 1984); UTAH CODE ANN. § 76-7-306(1) (1978); WASH. REV. CODE ANN. § 9.02.080 (1977); WIS. STAT. ANN. § 140.42(1) (West 1974).

400. *E.g.*, N.J. STAT. ANN. § 2A:65A-3 (West Supp. 1984); 18 PA. CONS. STAT. ANN. § 3213(d) (Purdon 1983).

401. *E.g.*, ALASKA STAT. § 18.16.010(a) (1981); ARK. STAT. ANN. § 41-2560(c) (1977); CAL. HEALTH & SAFETY CODE § 25955(a), (c) (West 1984); COLO. REV. STAT. § 18-6-104 (1978); DEL. CODE ANN. tit. 24, § 1791(a), (b) (1981); FLA. STAT. ANN. § 390.001(8) (West Supp. 1984); GA. CODE § 16-12-142 (1982); IDAHO CODE § 16-612 (1979); ILL. ANN. STAT. ch. 38, § 81-33 (Smith-Hurd Supp. 1984-1985); KAN. STAT. ANN. § 65-443 (1981); KY. REV. STAT. § 311.800(5) (1983); ME. REV. STAT. ANN. tit. 22, § 1591 (1980); MD. PUB. HEALTH CODE ANN. § 20-214(a)(2)(i) (1983); MASS. GEN. LAWS ANN. ch. 112, § 12I (1983); MINN. STAT. ANN. § 145.42(1) (West Supp. 1984); MO. ANN. STAT. § 197.032(1) (Vernon 1983); MONT. CODE ANN. § 50-20-111(1) (1983); NEB. REV. STAT. § 28-338 (1979); N.J. STAT. ANN. §§ 2A:65A-1 to 65A-3 (West Supp. 1984); N.Y. CIV. RIGHTS LAW § 79i(2) (McKinney 1976); N.C. GEN. STAT. § 14-45.1(e) (1981); OHIO REV. CODE ANN. § 4731.91 (Page 1977); OKLA. STAT. ANN. tit. 63, § 1-741 (West 1984); 18 PA. CONS. STAT. ANN. § 3213(d) (Purdon 1983); R.I. GEN. LAWS § 23-17-11 (1979); S.C. CODE ANN. § 44-41-50(b) (Law. Co-op. 1976); S.D. CODIFIED LAWS ANN. § 34-23A-12 (1977); UTAH CODE

plinary⁴⁰³ or recriminatory⁴⁰⁴ action. Statutes also proscribe discrimination against those relying on their statutory rights,⁴⁰⁵ particularly in connection with employment⁴⁰⁶ or educational⁴⁰⁷ opportunities.

On occasion, sanctions are supplied for violations of the conscience

ANN. § 76-7-306 (1978); VA. CODE § 18.2-75 (1982); WIS. STAT. ANN. § 140.42(2) (West 1974); WYO. STAT. § 35-6-106 (1977).

402. *E.g.*, ILL. ANN. STAT. ch. 38, § 81-33 (Smith-Hurd Supp. 1984-1985); 18 PA. CONS. STAT. ANN. § 3213(d) (Purdon 1983).

403. *E.g.*, ARK. STAT. ANN. § 41-2560 (1977); COLO. REV. STAT. § 18-6-104 (1978); DEL. CODE ANN. tit. 24, § 1791(a) (1981); FLA. STAT. ANN. § 390.001(8) (West Supp. 1984); GA. CODE ANN. § 16-12-142 (1982); ILL. ANN. STAT. ch. 38, § 81-33 (Smith-Hurd Supp. 1984-1985); IND. CODE ANN. § 16-10-3-2 (Burns 1983); ME. REV. STAT. ANN. tit. 22, § 1592 (1964); MD. PUB. HEALTH CODE ANN. § 20-214(a)(2)(ii) (1983); MINN. STAT. ANN. § 145-414 (West Supp. 1984); MONT. CODE ANN. § 50-20-111(1) (1983); N.J. STAT. ANN. § 2A-65A-3 (West Supp. 1984); N.M. STAT. ANN. § 30-5-2 (1984); N.C. GEN. STAT. § 14-45.1(e) (1981); OHIO REV. CODE ANN. § 4731.91(C) (Page 1977); OKLA. STAT. ANN. tit. 63, § 1-741 (West 1984); 18 PA. CONS. STAT. ANN. § 3213(d) (Purdon 1983); R.I. GEN. LAWS § 23-17-11 (1979); UTAH CODE ANN. § 78-11-25 (Supp. 1983); VA. CODE § 18.2-75 (1982); WIS. STAT. ANN. § 140.42(1) (West 1974).

404. *E.g.*, ARK. STAT. ANN. § 41-256(a) (1977); COLO. REV. STAT. § 18-6-104 (1978); DEL. CODE ANN. tit. 24, § 1791(a), (b) (1981); FLA. STAT. ANN. § 390.001(8) (West Supp. 1984); GA. CODE ANN. § 16-12-142 (1982); IDAHO CODE § 18-612 (1979); ME. REV. STAT. ANN. tit. 22, § 1592 (1980); MD. PUB. HEALTH CODE ANN. § 20-214(a)(2)(ii) (1983); MASS. GEN. LAWS ANN. ch. 112, § 12I (West 1983); MONT. CODE ANN. § 50-20-111(1) (1983); N.M. STAT. ANN. § 30-5-2 (1984); N.C. GEN. STAT. § 14-45.1(e) (1981); OKLA. STAT. ANN. tit. 63, § 1-741 (West 1984); R.I. GEN. LAWS § 23-17-11 (1979); UTAH CODE ANN. § 78-11-25 (Supp. 1983); VA. CODE § 18.2-75 (1982); WIS. STAT. ANN. § 140.42(1) (West 1974). MINN. STAT. ANN. § 145.414 (West Supp. 1984) proscribes coercion to allow abortions.

405. *E.g.*, N.J. STAT. ANN. §§ 2A:65A-1, 2A:65A-3 (West Supp. 1984); N.Y. CIV. RIGHTS LAW § 79i (McKinney 1976); N.D. CENT. CODE § 23-16-14 (1978); OHIO REV. CODE ANN. § 4731.91 (Page 1977).

406. *E.g.*, CAL. HEALTH & SAFETY CODE § 25955(a) (West 1984) (but medical employer can inquire into conscience reservation before hiring); ILL. ANN. STAT. ch. 38, § 81-33 (Smith-Hurd Supp. 1984-1985); IND. CODE ANN. § 16-10-3-2 (1983); IOWA CODE ANN. § 146.1 (West Supp. 1984-1985); KAN. STAT. ANN. § 65-443 (1981); KY. REV. STAT. § 311.800(5) (1983); ME. REV. STAT. ANN. tit. 22, § 1592 (1980); MASS. GEN. LAWS ANN. ch. 112, § 12I (West 1983); MINN. STAT. ANN. § 145.414 (West Supp. 1984); MO. ANN. STAT. § 197.032(2) (Vernon 1983); MONT. CODE ANN. § 50-20-111(1) (1983); NEB. REV. STAT. § 28-341 (1979); NEV. REV. STAT. § 632.475(2) (1979); 18 PA. CONS. STAT. ANN. § 3213(d) (Purdon 1983); S.C. CODE ANN. § 44-41-50(c) (Law. Co-op. 1976); S.D. CODIFIED LAWS ANN. § 34-23A-13 (1977); TEX. REV. CIV. STAT. ANN. art. 4512.7, §§ 1, 3, 4 (Vernon Supp. 1984); UTAH CODE ANN. § 78-11-25 (Supp. 1983) (including employment with other discrimination); VA. CODE § 18.2-75 (1982); WASH. REV. CODE ANN. § 9.02.080 (1977); WIS. STAT. ANN. § 140.42(3) (West 1974); WYO. STAT. § 35-6-106 (1977).

407. *E.g.*, CAL. HEALTH & SAFETY CODE § 25955(b) (West 1984) ("No medical school or other facility for the education or training of physicians, [or] nurses . . . shall refuse admission . . . or penalize . . . because of such person's unwillingness to participate in the performance of an abortion"); KY. REV. STAT. § 311.800(5)(c) (1983); MASS. GEN. LAWS ANN. ch. 112, § 12I (West 1983); 18 PA. CONS. STAT. ANN. § 3213(d) (Purdon 1983); TEX. REV. CIV. STAT. ANN. art. 4512.7, § 3 (Vernon Supp. 1984).

exception in the form of criminal penalties,⁴⁰⁸ and civil injunctive⁴⁰⁹ and damage⁴¹⁰ remedies.

C. Criminal Statutory Provisions Affecting Abortions

1. General Principles

In the immediate aftermath of *Roe v. Wade*, a few states voided their abortion legislation entirely, eliminating criminality for non-physician abortionists, as well as for medical practitioners performing therapeutic abortions.⁴¹¹ This was judicial overkill. In *Connecticut v. Menillo*,⁴¹² the Court confirmed that its 1973 *Roe* and *Bolton* decisions were not intended to provide a constitutional exemption from criminal law coverage for nonphysician abortionists.⁴¹³ State decisions are now uniform in recognizing the state's power to prosecute nonphysician abortionists.⁴¹⁴ This power extends, as well, to physi-

408. *E.g.*, NEB. REV. STAT. § 28-339 (1979) (class II misdemeanor); NEV. REV. STAT. § 632.475(4) (1979) (misdemeanor); N.Y. CIV. RIGHTS LAW § 79i(1) (McKinney 1976) (misdemeanor); WYO. STAT. § 35-6-113 (1977) (\$10,000 fine).

409. *E.g.*, MONT. CODE ANN. § 50-20-111(3) (1983); NEB. REV. STAT. § 28-341 (1979); TEX. REV. CIV. STAT. ANN. art. 4512.7, § 4 (Vernon Supp. 1984); WYO. STAT. § 35-6-114 (1977).

410. *E.g.*, ILL. ANN. STAT. ch. 111 1/2, § 5201(c) (Smith-Hurd Supp. 1984-1985) (treble damages with minimum \$2,000 recovery); IND. CODE ANN. § 16-10-3-2 (Burns 1983) (reinstatement of employment also available); MO. ANN. STAT. § 197.032(3) (Vernon 1983) (may recover in action at law, suit in equity or other redress); NEB. REV. STAT. § 28-340 (1979) (damages), § 28-341 (1979) (injunctive relief); OHIO REV. CODE ANN. § 4731.91(e) (Page 1977) (civil damages available); 18 PA. CONS. STAT. ANN. § 3213(d) (Purdon 1983) (civil liability in addition to liability for punitive damages in the amount of \$5,000); S.C. CODE ANN. § 44-41-50(c) (Law. Co-op. 1976) (reinstatement of employment also available); WYO. STAT. § 35-6-114 (1977).

411. *See* *State v. Hodgson*, 295 Minn. 294, 204 N.W.2d 199 (1973) (per curiam) (physician who performed abortion within first trimester secondary to the contraction of rubella by his pregnant patient not criminally convicted); *Commonwealth v. Jackson*, 454 Pa. 429, 312 A.2d 13 (1973) (per curiam) (nonphysician's conviction of committing an unlawful abortion was used).

412. 423 U.S. 9 (1975) (per curiam).

413. The Court noted that it was concerned with maternal health, and had only legitimated an "abortion . . . performed by medically competent personnel under conditions insuring maximum safety for the woman." *Id.* at 11. Hence, prosecutions of nonphysicians for first-trimester abortions "infringe upon no realm of personal privacy secured by the Constitution against state interference." *Id.* "The ever-increasing state interest in maternal health provides additional justification for such prosecutions." *Id.*

414. *See, e.g.*, *State v. Orsini*, 187 Conn. 264, 445 A.2d 887, *cert. denied*, 103 S. Ct. 136 (1982) (persistent felony offender claimed record of earlier conviction for aiding in criminal abortion was silent as to whether the principal was a physician; the court thought indications in the record that the abortion was performed in a motel room using a "shoe-horn device" was a sufficient indication the abortion was criminal); *State v. Menillo*, 171 Conn. 141, 368 A.2d 136 (1976) (application of abortion statute held valid as to nonphysicians) (on remand from *Connecticut v. Menillo*); *Rhim v. State*, 264 Ind. 682, 348 N.E.2d 620 (1976) (statute regulating abortions performed by nonphysicians remained unchanged when legislature passed statute regulating abortions by physicians); *Spears v. State*, 278 So. 2d 443 (Miss. 1973) (nonphysician subject to criminal penalties for performing abortion); *State v. Norflett*, 67 N.J. 268, 337 A.2d 609 (1975) (one without medical degree can be convicted under criminal abortion law). *See also* *Smith v.*

cians who violate constitutionally acceptable regulations of therapeutic abortions.⁴¹⁵

When prosecutions of the latter sort are initiated, however, federal constitutional principles require that the underlying legislation be sufficiently precise to give warning of the prohibited and acceptable activities. If the statute is vague and indefinite, it will be invalidated.⁴¹⁶ Beyond that, consistent with the Court's general approach to strict liability criminal legislation,⁴¹⁷ abortion statutes imposing felony or serious misdemeanor penalties must include a scienter (intent or knowledge) component, or they will be invalidated.⁴¹⁸ There is no constitutional barrier to a statutory requirement that proof of a medical justification be advanced by a physician defendant as an affirmative defense.⁴¹⁹

2. Persons Covered

As noted above, criminal statutes can only be invoked constitutionally against nonphysicians in general or against physicians who depart from acceptable medical practices.⁴²⁰ This is express in some statutes;⁴²¹ if not, courts must apply this meaning to the general

Bentley, 493 F. Supp. 916, 924-27 (E.D. Ark. 1980) (states can prohibit nonphysicians from performing abortions during any stage of pregnancy).

415. See *Simopoulos v. Virginia*, 462 U.S. 506 (1983) (requirement that second trimester abortions be performed in licensed clinics is not an unreasonable means of furthering state's compelling interest in protecting the woman's own health and safety).

416. See *City of Akron v. Akron Center for Reproductive Health, Inc.*, 103 S. Ct. at 2503-04 (invalidating criminal statute requiring disposal of fetal remains "in a humane and sanitary manner" because it failed to give physicians fair notice that the contemplated conduct is forbidden); *Colautti v. Franklin*, 439 U.S. 379 (1979) (statutes turning on whether fetus is "viable" void for vagueness); *Planned Parenthood v. Danforth*, 428 U.S. at 81-84 (statute imposing criminal penalties for failure to exercise degree of professional skill, care and diligence necessary to preserve life and health of fetus held invalid).

417. See *United States v. United States Gypsum Co.*, 438 U.S. 422, 434-46 (1978) (refusal to construe the Sherman Act as embracing strict liability criminal offenses). See also *Morrisette v. United States*, 342 U.S. 246 (1952).

418. *Colautti v. Franklin*, 439 U.S. at 395 ("[b]ecause of the absence of a scienter requirement in the provision directing the physician to determine whether the fetus is or may be viable, the statute is little more than 'a trap for those who act in good faith.'").

419. *Simopoulos*, 103 S. Ct. at 2535 (placing burden on a defendant of going forward with evidence on an affirmative defense generally is permissible).

420. See, e.g., *People v. Franklin*, 683 P.2d 775 (Colo. 1984) (osteopath could be convicted for performing a nontherapeutic abortion even though criminal statute unconstitutionally outlawed certain therapeutic abortions by licensed medical practitioners). See also *supra* notes 186-89 and accompanying text.

421. See, e.g., ALASKA STAT. § 18.16.010 (1981); ARK. STAT. ANN. § 41-2551 (1977); COLO. REV. STAT. § 18-6-101 (Supp. 1983); DEL. CODE ANN. tit. 24, § 1790(a) (1981); D.C.

term, "any person," if constitutional problems are to be avoided.⁴²²

3. Actus Reus

The objective acts embodied in traditional abortion legislation, still in force in some jurisdictions, are administering drugs or substances⁴²³ or using instruments or other means⁴²⁴ to terminate pregnancy. A majority of states, particularly those which have modernized their criminal legislation, require that the woman be pregnant,⁴²⁵ while a minority do not include that specific require-

CODE ANN. § 22-201 (1981); FLA. STAT. ANN. § 390.001(3) (West Supp. 1983); GA. CODE ANN. § 16-12-140(a) (1982); IDAHO CODE §§ 18-606(2), 18-608 (1979); ILL. ANN. STAT. ch. 38, § 38-23.1(A) (defined in ch. 38, § 81-22(3)) (Smith-Hurd Supp. 1984-1985); IND. CODE ANN. §§ 35-1-58.5-2, 35-1-58.5-4 (Burns Supp. 1984); IOWA CODE ANN. § 707.7, ¶ 3 (West 1979); KAN. STAT. ANN. § 21-3407(2) (1981); KY. REV. STAT. §§ 311.750, 311.760(2) (1983) (see also section 311.760(1) under which a woman herself is not a criminal for producing abortion during first trimester on advice of licensed physician); LA. REV. STAT. ANN. § 37:1285(8), (8.1), (9) (West Supp. 1984) (therapeutic abortions are dealt with under medical licensing statutes; this would seem to qualify § 14:874); ME. REV. STAT. ANN. tit. 22, § 1598(3)(A) (1980); MD. PUB. HEALTH CODE ANN. § 20-210(a)(3) (Supp. 1983-1984); MASS. GEN. LAWS ANN. ch. 112, §§ 12L, 12M, 12N (West 1983); MINN. STAT. ANN. § 145.412(1) (West Supp. 1984); MO. ANN. STAT. § 188.020 (Vernon 1983); MONT. CODE ANN. § 50-20-109 (1983); NEB. REV. STAT. § 28-335 (1979); NEV. REV. STAT. § 442.250(1) (1983); N.M. STAT. ANN. § 30-5-1(C) (1984); N.Y. PENAL LAW § 125.05(3) (McKinney 1975); N.C. GEN. STAT. §§ 14-44, 14-45, 14-45.1(a), (b) (1981); N.D. CENT. CODE § 14.02.1-04(5) (1981); OKLA. STAT. ANN. tit. 63, § 1-731(A) (West 1984); P.R. LAWS ANN. tit. 33, § 4010 (1979); S.C. CODE ANN. § 44-41-20 (Law. Co-op. 1976) (defined in § 44-41-10[b]); S.D. CODIFIED LAWS ANN. § 34-23A-3 (1977); TENN. CODE ANN. § 39-4-201(c) (1982); UTAH CODE ANN. § 76-7-302(1) (1978) (defined in § 76-7-301(2)); V.I. CODE ANN. tit. 14, § 151(b) (Supp. 1983); VA. CODE §§ 18.2-72, 18.2, 74.1 (1982); WASH. REV. CODE ANN. § 9.02.070 (1977); WIS. STAT. ANN. § 940.04(5)(a) (West 1982); WYO. STAT. § 35-6-111 (1977).

422. See, e.g., *People v. Bricker*, 389 Mich. 524, 208 N.W.2d 172 (1973) (conviction of nonphysician for conspiracy to commit an abortion); *Beecham v. Leahy*, 130 Vt. 164, 287 A.2d 836 (1972) (no justiciable controversy where physician sues for injunctive relief).

423. E.g., ALA. CODE § 13A-13-7 (1982); ARIZ. REV. STAT. ANN. § 13-3603 (1978); ARK. STAT. ANN. §§ 41-2551, 41-2553 (1977); CAL. PENAL CODE § 274 (West Supp. 1984); CONN. GEN. STAT. ANN. § 53-31a(a) (West Supp. 1984); DEL. CODE ANN. tit. 11, § 654 (1979); D.C. CODE ANN. § 22-201 (1981); GA. CODE ANN. § 16-12-140(a) (1982); IDAHO CODE § 18-605 (1979); ILL. ANN. STAT. ch. 38, § 81-22(6) (Smith-Hurd Supp. 1984-1985); LA. REV. STAT. ANN. § 14:87(1) (West 1974); ME. REV. STAT. ANN. tit. 22, § 1596(1)(A) (1980); MASS. GEN. LAWS ANN. ch. 272, § 19 (West 1984); MICH. COMP. LAWS ANN. § 750.14 (1968); MISS. CODE ANN. § 97-3-3(1) (1972); NEV. REV. STAT. § 201.120(1) (1979); N.M. STAT. ANN. § 30-5-3 (1984); N.Y. PENAL LAW § 125.05(2) (McKinney 1975); N.C. GEN. STAT. § 14-44 (1981); OKLA. STAT. ANN. tit. 21, § 861 (West 1983); P.R. LAWS ANN. tit. 33, § 4010 (1979); R.I. GEN. LAWS § 11-23-5 (1979); S.C. CODE ANN. § 44-41-80(a) (Law. Co-op. 1976); TENN. CODE ANN. § 39-4-201(1), (2) (1982); VT. STAT. ANN. tit. 13, § 101 (1974); VA. CODE § 18.2-71 (1982); WASH. REV. CODE ANN. § 9.02.010(1) (1977); W. VA. CODE § 61-2-8 (1984).

424. The statutes cited *supra* in note 423 contain this alternative with the following exceptions and additions: COLO. REV. STAT. § 18-6-102(1) (1978); DEL. CODE ANN. tit. 11, §§ 651, 654 (1979); KY. REV. STAT. § 311.720(1) (1983); NEV. REV. STAT. § 201.120(2) (1979); WASH. REV. CODE ANN. § 9.02.020 (1977).

425. E.g., ALA. CODE § 13A-13-7 (1982); ARIZ. REV. STAT. ANN. § 13-3603 (1978); ARK. STAT. ANN. §§ 41-2551, 41-2553 (1977); COLO. REV. STAT. § 18-6-101(1) (1978) (ter-

ment.⁴²⁶ If pregnancy is required, but the particular woman in fact was not pregnant, general attempt provisions in contemporary codes will cover the activity because traditional doctrines of impossibility have been abrogated.⁴²⁷ However, statutes based on activities with intent to produce a miscarriage function as a crystallized application of attempt law;⁴²⁸ at times, attempted abortion is covered

minating pregnancy); DEL. CODE ANN. tit. 11, § 651 (1979); IDAHO CODE § 18-605 (1979); ILL. ANN. STAT. ch. 38, § 81-22(6) (Smith-Hurd Supp. 1984-1985) (woman known to be pregnant; *but see* §§ 81-31[f], 81-31.1[II], making it a class 2 felony to perform abortions on women who are not pregnant); IND. CODE ANN. § 35-1-58.5-1(b) (Burns Supp. 1984) (termination of human pregnancy); IOWA CODE ANN. §§ 707.7 ¶ 2, 707.8(2) (West 1979) (termination of pregnancy); KAN. STAT. ANN. § 21-3407(1) (1981); KY. REV. STAT. § 311.720(1) (1983) (woman known to be pregnant); ME. REV. STAT. ANN. tit. 11, § 1596(a)(A) (1980) (interruption of pregnancy); MD. PUB. HEALTH CODE ANN. § 20-208 (Supp. 1983) (terminating human pregnancy); MASS. GEN. LAWS ANN. ch. 112, § 12K (West 1983); MINN. STAT. ANN. § 145.411(5) (West Supp. 1984) (must result in termination of pregnancy); MISS. CODE ANN. § 97-3-3(1) (1973) (pregnant with child); MO. ANN. STAT. § 188.015(1) (Vernon 1983) (termination of pregnancy); MONT. CODE ANN. § 50-20-104(4) (1983) (terminate a pregnancy); NEB. REV. STAT. § 28-326(1) (Supp. 1984) (woman known to be pregnant); N.H. REV. STAT. ANN. §§ 585:12, 585:13 (1974) (pregnant woman; pregnant with quick child); N.M. STAT. ANN. § 30-5-3 (1984) (pregnant woman); N.C. GEN. STAT. §§ 14-44, 14-45 (1981) (pregnant or quick with child; pregnant woman); N.D. CENT. CODE § 14-02.1-02(1) (1981) (definition of abortion as termination of human pregnancy); P.R. LAWS ANN. tit. 33, § 4010 (1983) (pregnant woman); R.I. GEN. LAWS § 11-23-5 (1979) (unborn quick child); S.C. CODE ANN. § 44-41-10(a) (Law. Co-op. 1976) (abortion defined as termination of human pregnancy); S.D. CODIFIED LAWS ANN. § 34-23A-1(1) (1977) (same); TENN. CODE ANN. § 39-4-201(a)(1) (1982) (pregnant, whether quick or not); UTAH CODE ANN. § 76-7-301(a) (1978 & Supp. 1983) (termination of pregnancy); V.I. CODE ANN. tit. 14, § 151(a) (Supp. 1983) (termination of human pregnancy); VA. CODE § 18.2-71 (1982) (intent to destroy unborn child, producing abortion or miscarriage and thus destroying child); W. VA. CODE § 61-2-8 (1984) (producing abortion or miscarriage); WIS. STAT. ANN. § 940.04 (West 1982) (destruction of life of unborn child); WYO. STAT. § 35-6-102 (1977) (after viability).

426. *E.g.*, CAL. PENAL CODE § 274 (West Supp. 1984); CONN. GEN. STAT. ANN. §§ 53-29, 53-31a(a) (West 1960); D.C. CODE ANN. § 22-201 (1981); GA. CODE ANN. § 16-12-140(a) (1982); LA. REV. STAT. ANN. § 14:87(2) (West 1974); NEV. REV. STAT. § 201.120(1) (1979) (whether pregnant or not); N.Y. PENAL CODE § 125.05(2) (McKinney 1975) (same); OKLA. STAT. ANN. tit. 21, § 861 (West 1983); VT. STAT. ANN. tit. 13, § 101 (1974) (pregnant or supposed to be pregnant); WASH. REV. CODE ANN. § 9.02.010(1) (1977) (whether pregnant or not).

427. *See* authorities cited *supra* at note 46.

428. *E.g.*, ARK. STAT. ANN. § 41-2551 (1977); CAL. PENAL CODE § 274 (West Supp. 1984); COLO. REV. STAT. § 18-6-103 (1978) (pretending to end real or apparent pregnancy); CONN. GEN. STAT. ANN. § 53-29 (West 1960); DEL. CODE ANN. tit. 11, § 654 (1979); GA. CODE ANN. § 16-12-140(a) (1982); IDAHO CODE § 18-605 (1979); ILL. ANN. STAT. ch. 38, §§ 81-31.1, 81-31.2 (Smith-Hurd Supp. 1984-1985); LA. REV. STAT. ANN. § 14:87 (West 1974); ME. REV. STAT. ANN. tit. 22, § 1596(1)(A) (1980); MASS. GEN. LAWS ANN. ch. 272, § 19 (West 1983); MONT. CODE ANN. § 50-20-104(4) (1983); NEV. REV. STAT. § 201.120(1) (1979); N.H. REV. STAT. ANN. § 585:12 (1974); OKLA. STAT. ANN. tit. 21, § 861 (West 1983); VT. STAT. ANN. tit. 13, § 101 (1974).

specifically.⁴²⁹

Some statutes continue to embody distinctions based on the stage of a pregnancy, in terms of time⁴³⁰ or viability.⁴³¹ These cannot be invoked against physicians practicing within the constitutional bounds established by the Supreme Court. They are, however, appropriately applied to laypersons as a means of grading punishments. The further into the pregnancies that illicit abortions are performed, the greater the danger to maternal life and health, and the greater the justification for augmented penalties. If, however, the statutes restrict the coverage of criminal abortion legislation as applied to nonphysicians, they are unwise, because there should be no lawful scope for such abortions.⁴³²

4. *Scienter*

Traditional statutes are clear that abortions must be done with intent to produce an abortion or miscarriage. Thus, they create no constitutional infirmities as far as *scienter* requirements are concerned. That seems to be a problem exclusively generated by recent therapeutic abortion statutes supported by residual criminal penalty provisions.⁴³³

5. *Weight*

The overwhelming majority of abortion statutes carry felony-level punishments,⁴³⁴ with few offenses punishable as misdemeanors.⁴³⁵ It

429. *E.g.*, D.C. CODE ANN. § 22-201 (1981); MD. PUB. HEALTH CODE ANN. § 20-208(a) (Supp. 1983); N.M. STAT. ANN. § 30-5-3 (1984); TENN. CODE ANN. § 39-4-201(a)(2) (1982); UTAH CODE ANN. § 76-7-301(1) (1978 & Supp. 1983).

430. *E.g.*, DEL. CODE ANN. tit. 24, § 1790(b)(1) (1981); IOWA CODE ANN. § 707.7 (West 1979); MD. PUB. HEALTH CODE ANN. § 20-208(b)(1) (Supp. 1983); NEV. REV. STAT. § 442.250(b)-(c) (1983); N.Y. PENAL LAW § 125.45 (McKinney 1975); WASH. REV. CODE ANN. § 9.02.070 (1977).

431. *E.g.*, ALASKA STAT. § 18.16.010 (1981); ARK. STAT. ANN. §§ 41-2551, 41-2553 (1977); ME. REV. STAT. ANN. tit. 22, § 1598 (1980); MINN. STAT. ANN. § 145.411(2) (West Supp. 1984); NEB. REV. STAT. § 28-329 (Supp. 1984); N.H. REV. STAT. ANN. § 585:13 (1974); N.C. GEN. STAT. § 14-44 (1981); R.I. GEN. LAWS. § 11-23-5 (1979); WIS. STAT. ANN. § 940.04 (West 1982).

432. *See* Connecticut v. Menillo, 423 U.S. at 11. *See also supra* note 413 and accompanying text. For illustrations of legislation apparently so limited, *see* IOWA CODE ANN. § 707.7 (West 1979); WYO. STAT. § 35-6-101 (1977).

433. *See supra* notes 417-18 and accompanying text. *See also* Harris v. McRae, 448 U.S. 297, 311 n.17 (1980) (Hyde Amendment criminal sanctions were valid because they contained "a clear *scienter* requirement under which good-faith errors are not penalized").

434. *See* the statutes cited *supra* in notes 423-31, all of which, except as listed *infra* in note 435, carry felony penalties.

435. *E.g.*, ALA. CODE § 13A-13-7 (1982) (fined not less than \$100 nor more than \$1,000 and imprisonment for not more than 12 months); ILL. ANN. STAT. ch. 38, § 81-31(a)-(e) (Smith-Hurd Supp. 1984-1985) (remaining provisions are punishable as felonies); ME. REV. STAT. ANN. tit. 11, § 1598(4) (1980) (abortion by a physician after viability is a class D crime, all other abortions are class C crimes); N.H. REV. STAT. ANN.

is possible that this field of penal law will prove susceptible to restriction under the eighth amendment prohibition against disproportionate punishments.⁴³⁶

6. Criminality Based on Neonatal Death

Statutory provisions governing care of neonates and fetuses during abortion and birth processes have been noted.⁴³⁷ Specific criminal penalties usually are set forth governing what in most instances is a form of medical malpractice.⁴³⁸ The chief deficiencies observable in

§ 585:12 (1974) (imprisoned not more than one year, or fined not more than \$1,000, or both); N.D. CENT. CODE § 14-02.1-04(4) (1981) (class A misdemeanor if physician violates regulations); WASH. REV. CODE ANN. § 9.02.070 (1977) (gross misdemeanor, if physician performs the abortion without consent or if the woman has not resided in the state for 90 days or if the abortion is performed in other than an accredited hospital or medical facility).

436. See *Solem v. Helm*, 103 S. Ct. 3001 (1983) (eighth amendment barred life sentence of imprisonment without possibility of parole against fourth offender for writing a check of \$100).

437. See *supra* notes 347-51 and accompanying text.

438. E.g., DEL. CODE ANN. tit. 24, § 1795(b) (Supp. 1982) (knowing and reckless conduct detrimental to life or health of live-born infant after abortion a class A misdemeanor); FLA. STAT. ANN. § 782.09 (West 1976) (killing unborn child by injury to mother deemed manslaughter); ILL. REV. STAT. ch. 38, §§ 31-24, 31-26(1) (Smith-Hurd Supp. 1984-1985) (class 2 felonies); IND. CODE ANN. § 35-1-58.5-7(c) (Burns Supp. 1984) (subject to homicide and manslaughter criminality); IOWA CODE ANN. §§ 707.9 (intentional killing of live-born fetus a class B felony), 707.10 (West 1979) (failure to preserve life and health of viable fetus a serious misdemeanor); LA. REV. STAT. ANN. §§ 14:87.1 (West 1974) (killing child during delivery punishable by life imprisonment), 14:87.5 (West Supp. 1984) (intentional failure to sustain life and health of live-born viable infant punishable by up to 21 years imprisonment); MASS. GEN. LAWS ANN. ch. 112, § 12T (West 1983) (failure to take reasonable steps to protect life and health of live-born child a misdemeanor, together with any other criminal liability); MICH. COMP. LAWS ANN. § 750.322 (1968) (wilful killing of unborn quick child by injury to mother is manslaughter), § 750.323 (1981) (successful efforts to kill unborn quick child is manslaughter); MONT. CODE ANN. § 50-20-108(1) (1983) (purposely, knowingly or negligently to cause death of premature viable infant born alive is criminal homicide); NEB. REV. STAT. § 28-332 (Supp. 1984) (class IV felony to fail to take reasonable steps to preserve life of live-born infant); NEV. REV. STAT. § 442.270(2) (1981) (failure to preserve life and health of live-born person subjects person to general criminal statutes); N.D. CENT. CODE §§ 14-02.1-05, 14-02.1-08 (1981) (class C felony to fail to preserve life and health of unborn child); OKLA. STAT. ANN. tit. 63, § 1-734(D) (West 1984) (persons killing neonate or failing to take reasonable measures to preserve life of infant are guilty of homicide); 18 PA. CONS. STAT. ANN. § 3210(b) (Purdon 1983) (third degree felony to fail to protect life of unborn viable child); R.I. GEN. LAWS § 11-9-18 (Supp. 1984) (knowingly and intentionally failing to provide reasonable medical care and treatment, causing death of live-born infant is manslaughter); S.D. CODIFIED LAWS ANN. § 22-17-6 (1978) (intentional killing of human fetus by causing injury to mother, other than during therapeutic abortion, a class 4 felony); TENN. CODE ANN. § 39-4-206(b) (1982) (felony to fail to use good medical skill to preserve life and health of live-born infant); TEX. REV. CIV. STAT. ANN. art. 4512.5 (Vernon 1976) (destroying life during parturition

some of these statutes are lack of a clear scienter requirement, vagueness problems in statement of the standard of duty,⁴³⁹ and disproportionality of punishments.

7. Criminality Based on Maternal Death

There is no need for special legislation governing the death of a woman in the course of an unlawful abortion or manifesting criminal negligence in the setting of a therapeutic abortion.⁴⁴⁰ Nevertheless, several states specially address that form of homicide.⁴⁴¹

8. Liability for Seeking Criminal Abortion

Some jurisdictions penalized women before 1973 for seeking abortions.⁴⁴² Some continue such penal law coverage as far as nontherapeutic abortions are concerned.⁴⁴³ Perpetuation of that form of

if child would have been born alive is a felony punishable by a minimum 5 years' imprisonment to life); UTAH CODE ANN. § 76-7-314(2) (1978) (third-degree felony to fail to use medical skills to preserve life of unborn child); WASH. REV. CODE ANN. § 9A.32.060(b) (1977) (intentionally killing unborn quick child by injuring mother is first-degree manslaughter); WYO. STAT. § 35-6-110 (1977) (felony intentionally to terminate viability of unborn infant or to fail to use accepted means of preserving live-born fetus).

See *State v. Lewis*, 429 N.E.2d 1110 (Ind. 1981), *cert. denied sub nom. Lewis v. Indiana*, 457 U.S. 1118 (1982) (doctor could be retried for unlawful postviability abortion performed at clinic rather than hospital; viability demonstrated by fact fetus had been born alive and had survived 2 hours).

439. See materials cited *supra* at note 416. See also *Commonwealth v. Edelin*, 371 Mass. 497, 359 N.E.2d 4 (1976) (insufficient evidence that physician's conduct was negligent or reckless, so that verdict of acquittal should have been directed; court divided equally as to whether death of fetus could be manslaughter); *Special Project, supra* note 27, at 156-59; Note, *Criminal Liability of Physicians: An Encroachment on the Abortion Right?*, 18 AM. CRIM. L. REV. 591, 609-15 (1981); Note, *Current Technology Affecting Supreme Court Abortion Jurisprudence*, 27 N.Y.L. SCH. L. REV. 1221, 1249-55 (1982).

440. See *supra* notes 53-56 and accompanying text.

441. *E.g.*, COLO. REV. STAT. § 18-6-102(2) (1978) (class 2 felony); D.C. CODE ANN. § 22-201 (1981) (second-degree murder); MASS. GEN. LAWS ANN. ch. 272, § 19 (West 1970) (felony punishable by five to 20 years' imprisonment); MISS. CODE ANN. § 97-3-3(1) (1972) (murder); N.H. REV. STAT. ANN. § 585:14 (1974) (second-degree murder); N.M. STAT. ANN. § 30-5-3 (1984) (second-degree felony); N.Y. PENAL LAW § 125.15(2) (McKinney 1975) (second-degree manslaughter); VT. STAT. ANN. tit. 13, § 101 (1974) (felony punishable by five to 20 years' imprisonment); WIS. STAT. ANN. § 940.04(2) (West 1982) (felony punishable by not more than 15 years' imprisonment).

Several statutes require coroners or medical examiners to inquire into deaths apparently resulting from criminal abortions. See, *e.g.*, FLA. STAT. ANN. § 406.11(1)(a)(9) (West Supp. 1984); LA. REV. STAT. ANN. § 33:1561 (West Supp. 1984); MASS. GEN. LAWS ANN. ch. 38, § 6 (West Supp. 1984); MISS. CODE ANN. § 41-61-9 (1972).

On wrongful death civil liability, see *supra* note 383 and accompanying text.

442. See *supra* notes 56-64 and accompanying text.

443. *E.g.*, ARIZ. REV. STAT. ANN. § 13-3604 (1978); CAL. PENAL CODE § 274 (West Supp. 1984) (exempting therapeutic abortions); CONN. GEN. STAT. ANN. §§ 53-30 (1960), 53-31a (West Supp. 1984); DEL. CODE ANN. tit. 11, § 651 (1979); IDAHO CODE § 18-606(2) (1979) (soliciting, submitting to or self-inducing), § 18-609(1) (Supp. 1984) (except for lawful abortion); KY. REV. STAT. § 311.750 (1983) (prohibits self-abortion), § 311.760(1)

criminality, however, is as unwise today as it was before 1973, because of the difficulties it creates in criminal justice administration.⁴⁴⁴

9. Advertising Abortifacients

Criminal statutes penalizing the advertising of abortions and abortifacients have been evident for generations.⁴⁴⁵ A number of such provisions continue to exist in unmodified form.⁴⁴⁶ They are unconstitutional because they do not exempt dissemination of information about lawful therapeutic abortions which constitute a form of commercial speech protected by the first amendment.⁴⁴⁷ Therefore, several statutes have been amended to conform with *Bigelow v.*

(1983) (except on advice of licensed physician); MONT. CODE ANN. § 50-20-104(4) (1983) (abortion defined to include "submission to act or operation"); NEV. REV. STAT. § 200.220 (1983) (submission to abortion after 24th week of gestation except as authorized under therapeutic abortion statute), § 201.120(2) (1979) (self-abortion except as a therapeutic abortion on advice of licensed physician); N.Y. PENAL LAW §§ 125.05(3) (McKinney 1975) (woman's act is justifiable if she believes it is done by physician performing lawful abortion), 125.50 (McKinney 1975) (second-degree self-abortion through 24th week of pregnancy; class B misdemeanor), 125.55 (McKinney 1975) (first-degree self-abortion if more than 24 weeks pregnant; class A misdemeanor); OKLA. STAT. ANN. tit. 21, § 862 (West 1983) (soliciting, taking substance or using means to procure miscarriage; misdemeanor), tit. 63, § 1-733 (West 1984) (no woman to perform or induce abortion on self except under supervision of licensed physician); P.R. LAWS ANN. tit. 33, § 4011 (1979) (any solicitation for an abortion is a felony punishable by 2 to 5 years' imprisonment); S.C. CODE ANN. § 44-41-80(b) (Law. Co-op. 1976) (misdemeanor to solicit abortion unless justified); V.I. CODE ANN. tit. 14, §§ 152 (Supp. 1983) (woman lawfully may submit when physician lawfully may perform abortion), 156 (Supp. 1983) (violation a felony); WASH. REV. CODE ANN. § 9.02.020 (1977) (submitting to abortion a felony unless justified).

Some states, e.g., 18 PA. CONS. STAT. ANN. § 3218 (Purdon 1983) and VT. STAT. ANN. tit. 13, § 101 (1974), specifically preclude a woman's criminality.

444. See *supra* notes 59-64 and accompanying text.

445. See *supra* notes 67-69 and accompanying text.

446. E.g., ARIZ. REV. STAT. ANN. § 13-3605 (1978) (misdemeanor); FLA. STAT. ANN. § 797.02 (West 1976) (misdemeanor); MASS. GEN. LAWS ANN. ch. 272, § 20 (West 1970) (felony); MICH. COMP. LAWS ANN. §§ 750.15, 750.34 (1968) (immoral advertising); MISS. CODE ANN. § 97-3-5 (1972); MONT. CODE ANN. § 50-20-109(4) (1983); NEV. REV. STAT. § 442.270(1) (1981); N.D. CENT. CODE § 14-02.1-06 (1981); P.R. LAWS ANN. tit. 10, § 315 (1976) (public display or advertising), tit. 33, § 4012 (1983); VT. STAT. ANN. tit. 13, § 104 (1974 & Supp. 1984); WASH. REV. CODE ANN. § 9.68.030 (1977).

447. See *Bolger v. Youngs Drug Prods. Corp.*, 103 S. Ct. 2875 (1983) (contraceptives and contraceptive information); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 700-02 (1977) (same); *Bigelow v. Virginia*, 421 U.S. 809 (1975) (advertisement of lawful therapeutic abortion services).

See also *Coalition for Abortion Rights and Against Sterilization Abuse v. Niagara Frontier Transp. Auth.*, 584 F. Supp. 985 (W.D.N.Y. 1984) (public transportation authority's refusal to allow advertising about the availability of therapeutic abortions at public service rates, when similar advertising bearing on reproductive choices had been

Virginia concepts;⁴⁴⁸ the residual coverage would seem to be constitutional.⁴⁴⁹

10. Soliciting Abortions

Some traditional statutes have penalized the act of soliciting women for abortions.⁴⁵⁰ To the extent they fall within the advertising cases discussed immediately above, they are subject to equivalent constitutional attack. However, even if such statutes apply only to personal contacts, they seem clearly unconstitutional under *Roe v. Wade* because they impede access by women to lawful therapeutic abortions. Recent legislation reflects such concerns.⁴⁵¹

11. Trafficking in Abortifacients

Criminal regulation of abortifacients, like restrictions on advertising and solicitation, came onto statute books in the nineteenth century.⁴⁵² Many such laws have been continued in force without change.⁴⁵³ However, to the extent they burden the availability of lawful therapeutic abortions, they are unconstitutional.⁴⁵⁴ Conse-

accommodated at those rates, violated the Coalition's first and fourteenth amendment rights).

448. 421 U.S. 809 (1975). *E.g.*, CONN. GEN. STAT. §§ 53-31 (1960), 53-31a (Supp. 1984); IDAHO CODE § 18-604 (1979) (physicians and licensed health care providers), § 18-607 (1979) (except to physicians or druggists or distributors to others, or in trade or professional channels unlikely to reach the general public); MD. PUB. HEALTH CODE ANN. § 20-210(a)(2) (Supp. 1983) (other than by physicians in licensed and accredited hospitals [probably too limited an exception to meet *Bigelow* requirements]); VA. CODE § 18.2-76.1 (1982) (amended after *Bigelow*); WIS. STAT. ANN. § 450.11(2) (West Supp. 1984).

449. *Cf.* *Baird v. La Follette*, 72 Wis. 2d 1, 239 N.W.2d 536 (1976) (statute construed not to cover educational and informational exhibits in the context of free public lectures; could not ban even in a commercial setting good faith educational presentation of general information regarding contraception). *See generally Warren, supra* note 17, at 45-47. A telephone company acted properly in refusing to delete abortion clinic advertising in a classified directory, ordered by state public utilities commission based on the commission's ruling that the advertising was "deceptive." *Neary v. Pennsylvania Public Utility Comm'n*, 78 Pa. Commw. 636, 468 A.2d 520 (1983).

450. *E.g.*, CONN. GEN. STAT. §§ 53-29 (1960), 53-31a (Supp. 1984); IDAHO CODE § 18-606(1) (1979); MASS. GEN. LAWS ANN. ch. 272, § 20 (West 1970); MONT. CODE ANN. § 50-20-109(4) (1983) (by physician, hospital or other person or agency); NEV. REV. STAT. § 442.270(1) (1981) (person or organization not to advertise directly or indirectly abortion costs or conditions); N.D. CENT. CODE § 14-02.1-06 (1981); V.I. CODE ANN. tit. 14, § 153 (Supp. 1984) (no public or private organization or society is to be created for purpose of soliciting candidates for abortion).

451. *E.g.*, CAL. PENAL CODE § 276 (West Supp. 1984); DEL. CODE ANN. tit. 24, § 1792(2) (Supp. 1983).

452. *See supra* notes 69-75 and accompanying text.

453. *E.g.*, LA. REV. STAT. ANN. § 14:88(1) (West 1974); MISS. CODE ANN. § 97-3-5 (1972); NEV. REV. STAT. § 201.130 (1979); VT. STAT. ANN. tit. 13, § 104 (Supp. 1984).

454. *See Carey v. Population Servs. Int'l*, 431 U.S. 678, 688 (1977):

[T]he same test must be applied to state regulations that burden an individual's right to . . . terminate pregnancy by substantially limiting access to the means of effectuating that decision as is applied to state statutes that prohibit

quently, most contemporary statutes either exempt therapeutic abortions⁴⁵⁵ or limit their coverage to unlawful abortions.⁴⁵⁶

12. Special Evidentiary Provisions

A few statutes require that a woman's testimony concerning a criminal abortion be corroborated.⁴⁵⁷ Vermont's abortion statute allows a woman's statements in evidence as a dying declaration if she dies following an abortion.⁴⁵⁸ Two jurisdictions immunize a woman's testimony against incriminating use so that she may be called as a prosecution witness.⁴⁵⁹ Legislation of this sort is probably residual from earlier times and deserves repeal.

Rhode Island legislation states that it is unnecessary for the prosecution to prove that an abortion was not legally justified.⁴⁶⁰ Current constitutional doctrine legitimates placement of a burden of going forward with evidence on the defendant; however, the legality of im-

the decision entirely. Both types of regulation "may be justified only by a 'compelling state interest' . . . and . . . must be narrowly drawn to express only the legitimate state interests at stake."

Id. (citing *Roe v. Wade*, 410 U.S. 113, 155 (1973)).

455. *E.g.*, CAL. PENAL CODE § 274 (West Supp. 1984); COLO. REV. STAT. § 18-6-105 (1978) (other than licensed physician); CONN. GEN. STAT. § 53-31a(b) (West Supp. 1984) (exempts licensed physician or hospital); DEL. CODE ANN. tit. 24, § 1792(1) (1981) (exempting for purposes of lawful abortion under § 1790); IDAHO CODE § 18-607 (1979) (except to physician or druggist or distributor, or on prescription or order of physician, or possession with intent to supply to lawful recipient); ILL. ANN. STAT. ch. 38, § 81-31(d) (Smith-Hurd Supp. 1984-1985) (without prescription); IOWA CODE ANN. § 205.1 (West 1969) (exempting supplying on prescription), § 205.2 (West 1969) (exempts those supplying physicians, etc., for use in the practice of their profession); MICH. COMP. LAWS ANN. § 750.15 (1968) (except on prescription [probably too narrow under *Carey*]); S.C. CODE ANN. § 44-41-80(a) (Law. Co-op. 1976) (except in connection with therapeutic abortions; women on whom abortions performed are not within criminal provisions); WIS. STAT. ANN. § 450.11(2) (West Supp. 1984) (except to licensed physicians or medical services).

456. *E.g.*, MASS. GEN. LAWS ANN. ch. 272, § 21 (West 1970); N.Y. PENAL LAW § 125.60 (McKinney 1975); WASH. REV. CODE ANN. § 9.02.030(1977).

457. *E.g.*, IDAHO CODE § 19-2115 (1979); NEV. REV. STAT. § 175.301 (1981) (unless the person on whom the offense was committed was at the time a police officer or deputy sheriff (legitimizing use of policewomen decoys)). *See also supra* notes 58-59 and accompanying text.

458. VT. STAT. ANN. tit. 13, § 102 (1974).

459. NEV. REV. STAT. § 201.140 (1979) (abortion, attempted abortion or selling abortifacients); WASH. REV. CODE ANN. § 9.020.040 (1977) (no person can claim a privilege against self-incrimination in prosecutions for abortion, attempted abortion or selling drugs, but is immunized under WASH. REV. CODE ANN. § 10.52.090 (1980)). *See also supra* notes 59-63 and accompanying text.

460. R.I. GEN. LAWS § 11-23-5 (1981) (unnecessary to save woman's life, this basic provision is unconstitutional under *Roe v. Wade* if applied to physicians, and superfluous in actuality in instances of criminal abortion).

posing the burden of persuasion on the defendant is unclear.⁴⁶¹ The volatile and controversial context of abortion is probably not the most appropriate one to test such issues.

D. *Economic Aspects of Therapeutic Abortions*

1. Public Funding of Abortions

A logical corollary of the Supreme Court's holding in *Roe v. Wade* seemingly would have been that states and the federal government should be required to provide the same financial support for therapeutic abortions as they offer for other medical services to financially unable citizens. Otherwise, government would burden the free exercise of women's rights to have abortions and create invidious distinctions among classes of patients based on financial considerations. However, logic lost as the issue came before the Supreme Court.

In *Maher v. Roe*,⁴⁶² welfare recipients attacked a state exclusion of Medicaid payments to patients receiving therapeutic abortions; a federal district court found the preclusion to deny equal protection. The Supreme Court disagreed. Although it did not depart from its *Roe v. Wade* principle that the Constitution protects women from unduly burdensome interference with the freedom to terminate pregnancies, it held that there is no constitutional barrier to a state's making "a value judgment favoring childbirth over abortion and . . . implement[ing] that judgment by the allocation of public funds."⁴⁶³ Financially unable patients not wishing to take advantage of state-supported childbirth must depend on private sources:

The State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there. The indigency that may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions is neither created nor in any way affected by the [state] regulation.⁴⁶⁴

In short, the Court perceived a

basic difference between direct state interference with a protected activity and

461. See *Simopoulos v. Virginia*, 103 S. Ct. at 2535. Whether the burden of persuasion may be placed on the defendant requires a harmonization of language in *Read v. Ross*, 104 S. Ct. 2901 (1984); *Engle v. Isaac*, 456 U.S. 107 (1982); *Patterson v. New York*, 432 U.S. 197 (1977); and *Mullaney v. Wilbur*, 421 U.S. 684 (1975), an important issue which, nevertheless, need not be elaborated upon here.

462. 432 U.S. 464 (1977). See generally Appleton, *Beyond the Limits of Reproductive Choice: The Contribution of the Abortion-Funding Cases to Fundamental-Rights Analysis and to the Welfare-Rights Thesis*, 81 COLUM. L. REV. 721, 724-31 (1981) [hereinafter cited as Appleton]; Canby, *Government Funding, Abortions, and the Public Forum*, 1979 ARIZ. ST. L.J. 11; Horan & Marzen, *The Moral Interest of the State in Abortion Funding: A Comment on Beal, Maher & Poelker*, 22 ST. LOUIS U.L.J. 566 (1978); Jones, *supra* note 11, at 594-600; Petersen, *The Public Funding of Abortion Services: Comparative Developments in the United States and Australia*, 33 INT'L & COMP. L.Q. 158 (1984).

463. 432 U.S. at 474.

464. *Id.*

state encouragement of an alternative activity consonant with legislative policy. Constitutional concerns are greatest when the State attempts to impose its will by force of law; the State's power to encourage actions deemed to be in the public interest is necessarily far broader.⁴⁶⁵

Two other decisions during the same term documented the Court's theme. In *Beal v. Doe*,⁴⁶⁶ the Court applied an identical analysis to title XIX of the Social Security Act,⁴⁶⁷ which it construed not to require state funding of nontherapeutic abortions, but not to preclude such funding either.⁴⁶⁸ In *Poelker v. Doe*,⁴⁶⁹ it ruled that publicly-owned and operated hospitals did not have to offer free hospital abortion services even though they provided free childbirth facilities. The rationale was that of *Maher v. Roe*.

While *Beal v. Doe* was awaiting final resolution, Congress had begun enacting an annual prohibition⁴⁷⁰ which in varying forms banned the use of federal Medicaid funding for nontherapeutic abortions or therapeutic abortions other than for certain restricted reasons.⁴⁷¹ Constitutional attacks on it were launched immediately, since *Beal v. Doe* had dealt only with construction of Medicaid provisions not bearing the Hyde Amendment limitation. In *Harris v. McRae*,⁴⁷² the

465. *Id.* at 475-76 (footnote omitted).

466. 432 U.S. 438 (1977).

467. 42 U.S.C. §§ 1396a(a)(13)(B), (17), 1396d(a)(1)-(5) (1983).

468. *Beal v. Doe*, 432 U.S. at 447.

469. 432 U.S. 519 (1977). *Poelker* was distinguished by the Eighth Circuit Court of Appeals, however, when it enjoined a city hospital commission from refusing to allow staff at the only hospital in the community, publicly owned, to perform lawful abortions for paying patients. *Nyberg v. City of Virginia*, 667 F.2d 754, 757-58 (8th Cir. 1982), *appeal dismissed, cert. dismissed*, 103 S. Ct. 3102 (1983).

470. Called the Hyde Amendment after its original congressional sponsor. See *Harris v. McRae*, 448 U.S. 297, 302-03 (1980); Vinovskis, *The Politics of Abortion in the House of Representatives in 1976*, 77 MICH. L. REV. 1790 (1979).

The Republican Party Platform of 1984 opposed the use of public revenues for abortion and called for elimination of funding for organizations advocating or supporting abortion. 42 Cong. Q. 2110 (Aug. 25, 1984). The Democratic Party Platform approached the question somewhat more elliptically: it opposed "government interference which denies poor Americans their right to privacy by funding or advocating one or a limited number of reproductive choices only." 42 Cong. Q. 1767 (July 21, 1984).

471. The 1977 version acknowledged only danger to maternal life, while the 1979 language recognized "severe and long-lasting physical health damage"; the 1980 version included rape or incest if reported promptly to a law enforcement agency or public health service. See *Harris v. McRae*, 448 U.S. at 302-03. The fiscal year 1984 version covers only instances "where the life of the mother would be endangered if the fetus were carried to term." Departments of Labor, Health and Human Services, and Education Appropriations Act. Pub. L. No. 98-139, § 204, 97 Stat. 871, 887 (1983).

472. 448 U.S. 297 (1980). Later the same term, in *Williams v. Zbaraz*, 448 U.S. 358 (1980), the Court held that a state participating in the Medicaid program is not obligated to underwrite medically indicated abortions for which federal reimbursement is unavailable under the Hyde Amendment; the Court confirmed that state funding re-

Court reiterated its *Maier v. Roe* premise that legislative bodies, including Congress, can refuse to underwrite therapeutic abortions and, "by means of unequal subsidization of abortion and other medical services, encourage alternative activity deemed in the public interest."⁴⁷³ Moreover, it rejected a contention that the Hyde Amendment, by embodying Roman Catholic doctrines rejecting abortion, violated the establishment clause dimension of the first amendment.⁴⁷⁴ The Court thought, as well, that the legislation embodied no invidious discrimination violating equal protection as guaranteed in the fifth and fourteenth amendments. Congress could authorize federal reimbursement for medically necessary services generally, but need not do so for medically indicated abortions: "Abortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life."⁴⁷⁵

The Court's 1977 and 1980 rulings have served to legitimate legislation in about one-quarter of American jurisdictions limiting the use of state,⁴⁷⁶ local⁴⁷⁷ and on occasion federal pass-through⁴⁷⁸ funding

strictions patterned on the Hyde Amendment do not violate fourteenth amendment equal protection. See generally *Appleton*, *supra* note 463; *Isaacs*, *supra* note 11, at 71-75; *Jones*, *supra* note 11, at 600-05; Yarbrough, *The Abortion-Funding Issue: A Study in Mixed Constitutional Cues*, 59 N.C.L. REV. 611 (1981).

473. *Harris v. McRae*, 448 U.S. at 315.

474. *Id.* at 318-20. The Court also found that the plaintiffs lacked standing to litigate whether the Hyde Amendment interfered with their "free exercise" rights under the amendment. *Id.* See also Note, *Abortion Laws, Religious Beliefs and the First Amendment*, 14 VAL. U.L. REV. 487 (1980); Comment, *The Establishment Clause and Religious Influences on Legislation*, 75 NW. U.L. REV. 944 (1980).

On the religious dimension of the Hyde Amendment and similar legislative efforts to limit the impact of *Roe v. Wade*, see, e.g., Symonds, *The Denial of Medi-Cal Funds for Abortion: An Establishment of Religion*, 9 GOLDEN GATE 421 (1978-1979); Pilpel, *The Fetus as Person: Possible Legal Consequences of the Hogan-Helms Amendment*, 6 FAM. PLANNING PERSPECTIVES, No. 1, p. 6 (Winter 1974); Editorial, *Do Catholics Have Constitutional Rights?*, 105 COMMONWEAL 771 (Dec. 8, 1978).

475. *Harris v. McRae*, 448 U.S. at 325.

Following enactment of the Hyde Amendment, federal courts required interim funding for therapeutic abortions until welfare recipients could be notified about reductions in Medicaid benefits, *Pennsylvania v. Department of Health and Human Services*, 723 F.2d 1114 (3d Cir. 1983) (based on more general federal legislation creating the Medicaid system), and continued reimbursement to states for abortions performed pursuant to federal court order. *Georgia Dep't of Medical Assistance v. Heckler*, 583 F. Supp. 1377 (N.D. Ga. 1984) (based on federal legislation and implementing administrative regulations).

Efforts to deny to Planned Parenthood groups eligibility to participate in the Combined Federal Campaign for charitable giving by federal employees, based on their support for therapeutic abortion, have been frustrated through federal court intervention based on the first amendment. *Planned Parenthood Federation of Am. v. Devine*, No. 83-2118 (D.D.C. Sept. 14, 1983), summarized in *Devine v. NAACP Legal Defense and Educ. Fund, Inc.*, 727 F.2d 1247, 1262 (D.C. Cir.), cert. granted, 105 S. Ct. 322 (1984).

476. See, e.g., ARIZ. REV. STAT. ANN. § 35-196.02 (Supp. 1984); ILL. ANN. STAT. ch. 23, §§ 5-5, 6-1 (Smith-Hurd Supp. 1984-1985); IND. CODE ANN. § 16-10-3.3 (Burns 1983); KY. REV. STAT. §§ 205.560(1), 311.715 (1983); MINN. STAT. ANN. § 145.925(2) (West Supp. 1984), § 256B.40 (West 1982); N.J. STAT. ANN. § 30:4D-6.1 (West 1981) (*but see* *Right to Choose v. Byrne*, 91 N.J. 287, 450 A.2d 925 (1982)); N.D. CENT. CODE §§ 14-

for purposes of abortion. Similar restrictions may govern public employee or other health insurance plans,⁴⁷⁹ family planning services⁴⁸⁰ and miscellaneous benefits.⁴⁸¹ Exceptions may be indicated, however, to cover abortions necessary to preserve maternal life,⁴⁸² or used to terminate pregnancies resulting from rape⁴⁸³ or incest.⁴⁸⁴

02.3-01, 14-02.3-05 (1981) (violation a class B misdemeanor); 18 PA. CONS. STAT. ANN. § 3215(c) (Purdon 1983); PA. STAT. ANN. tit. 62, § 453 (Purdon Supp. 1984-1985); UTAH CODE ANN. § 26-18-4(3)-(4) (Supp. 1984) (violation of a class B misdemeanor), § 26-18-10(7) (Supp. 1983); W. VA. CODE § 16-2B-2 (1979) (state funds not to be used for abortion as a means of family planning); WIS. STAT. ANN. § 20.927(1) (West Supp. 1984).

477. *E.g.*, ARIZ. REV. STAT. ANN. § 35-196.02 (Supp. 1984); IND. CODE ANN. § 16-10-3.3 (Burns 1983); KY. REV. STAT. § 311.715 (1983); MINN. STAT. ANN. § 261.28, 393.07(11) (West Supp. 1984); N.D. CENT. CODE § 14-02.3-01 (1981); 18 PA. CONS. STAT. ANN. § 3215(c) (Purdon Supp. 1983); PA. STAT. ANN. tit. 62, § 453 (Purdon Supp. 1984-1985); UTAH CODE ANN. § 26-18-10(6)-(7) (1984); W. VA. CODE § 16-2B-2 (1979); WIS. STAT. ANN. § 20.927(1) (West Supp. 1984).

478. *E.g.*, MINN. STAT. ANN. § 256B.40 (West 1982); N.D. CENT. CODE § 14-02.3-01 (1981); 18 PA. CONS. STAT. ANN. § 3215(c) (Purdon Supp. 1983); PA. STAT. ANN. tit. 62, § 453 (Purdon Supp. 1984); WIS. STAT. ANN. § 20.927(1) (West Supp. 1984).

479. ILL. ANN. STAT. ch. 127, § 526 (Smith-Hurd Supp. 1984-1985) (noncontributory health insurance payments to state employees); N.D. CENT. CODE § 14.02.3-03 (1981) (all health insurance policies, except by optional rider with extra premium); 18 PA. CONS. STAT. ANN. § 3215(d) (Purdon 1983) (funded for employees out of public monies); R.I. GEN. LAWS § 36-12-2.1 (1984) (state or local health insurance plans); S.C. CODE ANN. § 1-13-30(l) (Law. Co-op. Supp. 1983) (sex discrimination statute does not require employer to pay health benefits for abortion, but employer may agree to do so through collective bargaining).

480. UTAH CODE ANN. §§ 76-7-322, 76-7-323 (Supp. 1983); W. VA. CODE § 16-2B-2 (1979).

481. Including prohibitions against providing hospital or nursing care services, *e.g.*, ILL. ANN. STAT. ch. 23, § 7-1 (Smith-Hurd Supp. 1984-1985); N.D. CENT. CODE § 14-02.3-04 (1981); 18 PA. CONS. STAT. ANN. § 3215(a), (b) (Purdon 1983) (except for treatment of post-abortion complications or when no other facility performing abortions is available within a radius of 20 miles), disability benefits, *e.g.*, ILL. ANN. STAT. ch. 23, § 6-1 (Smith-Hurd Supp. 1984-1985), or burial benefits. *Id.* § 7-1.

482. *E.g.*, ARIZ. REV. STAT. ANN. § 35-196.02 (Supp. 1984); ILL. ANN. STAT. ch. 23, §§ 6-1, 7-1 (Smith-Hurd Supp. 1984-1985); IND. CODE § 16-10-3-3 (1983); KY. REV. STAT. §§ 205.560(6), 311.715 (1983); MINN. STAT. ANN. § 256B.02(8)(13)(a) (West 1982); N.J. STAT. ANN. § 30:4D-6-1 (West 1981); N.D. CENT. CODE § 14-02.3-01 (1981); 18 PA. CONS. STAT. ANN. § 3215(c)(2) (Purdon Supp. 1983); PA. STAT. ANN. tit. 62, § 453 (Purdon Supp. 1984); UTAH CODE ANN. § 26-18-4(3) (Supp. 1983); WIS. STAT. ANN. § 20.927(2)(a) (West Supp. 1984). In addition, ILL. ANN. STAT. ch. 23, §§ 6-1, 7-1 (Smith-Hurd Supp. 1984-1985), exempts abortions necessary to the health of either mother or unborn viable child, while WIS. STAT. ANN. § 20.927(2)(b) (West Supp. 1984) exempts cases in which a preexisting condition will cause grave, long-lasting physical health damage to a woman if she is not given an abortion. The health of an unborn viable child may be recognized under ILL. ANN. STAT. ch. 23, §§ 6-1, 7-1 (Smith-Hurd Supp. 1984-1985), and VA. CODE § 32.1-92.2 (Supp. 1984) recognizes the eugenic ground of a physician's certification that a fetus will be born with a gross and totally incapacitating physical deformity or mental deficiency.

483. *E.g.*, MINN. STAT. ANN. § 256B.02(13)(b) (West 1982); 18 PA. CONS. STAT. ANN.

Moreover, a few state appellate courts have invalidated or limited the impact of restrictive legislation on state legal grounds.⁴⁸⁵

2. Protecting Women Electing Abortions

It would be a clear violation of *Roe v. Wade* standards for state officials in any way to coerce women to have or to decline abortions. A few states specifically prohibit the former.⁴⁸⁶ Beyond that, legislation may bar discrimination or loss of privileges⁴⁸⁷ or denial of public benefits⁴⁸⁸ to women who refuse to have abortions⁴⁸⁹ or, on occasion,

§ 3215(c)(3) (Purdon 1983); VA. CODE § 32.1-92.1 (Supp. 1984); WIS. STAT. ANN. § 20.927(2)(a) (West Supp. 1984).

484. MINN. STAT. ANN. § 256B.02(13)(c) (West 1982); 18 PA. CONS. STAT. ANN. § 3215(c)(2)(3) (Purdon 1983); VA. CODE § 32.1-92.1 (Supp. 1984); WIS. STAT. ANN. § 20.927(2)(a) (West Supp. 1984).

485. *E.g.*, *Committee to Defend Reproductive Rights v. Myers*, 29 Cal. 3d 252, 625 P.2d 779, 172 Cal. Rptr. 866 (1981) (budget act excluding funds to underwrite therapeutic abortions was declared in violation of the state constitution); *Committee to Defend Reproductive Rights, Inc. v. Rank*, 151 Cal. App. 3d 83, 198 Cal. Rptr. 630 (1984) (budget act restricting use of public funds for abortions found in conflict with basic Medi-Cal statute authorizing funds for therapeutic abortions); *Kindley v. Governor of Md.*, 289 Md. 620, 426 A.2d 908 (1981) (court construed state legislation to cover all abortions determined by physicians in the patients' best interest, but noted the lack of a legal obligation to fund abortions); *Bayne v. Secretary of State*, 283 Md. 560, 392 A.2d 67 (1978) (budget appropriation for public funding of abortions was not subject to state constitutional provision for popular referendum, which specifically excluded budgetary legislation); *Right to Choose v. Byrne*, 91 N.J. 287, 450 A.2d 925 (1982) (state constitution required invalidation of state legislation tracking Hyde Amendment; public funding must extend to all abortions necessary to maternal health); *Stam v. Hunt*, 66 N.C. App. 116, 310 S.E.2d 623 (1984) (rejecting citizen attack on state funding for therapeutic abortions based on claim that \$1 million appropriation for purpose had been exhausted; legislature had appropriated additional funds).

In *Reina v. Landeskreditbank Baden-Württemberg*, 1982 C.J. Comm. E. Rec. 33, 40, the European Court of Justice held that special interest-free loans to residents upon childbirth were a "social advantage" which could not be denied workers from another member state under art. 7(1) of the EEC Treaty and art. 7(2) of Council Regulation (EEC) No. 1612/68 (the anti-discrimination regulation). The court rejected a justification advanced by Baden-Württemberg that childbirth loans were intended to encourage larger families among residents; demographic objectives of countering falling birth rates among a member state's nationals cannot be pursued in a way which discriminates against nationals of other member states.

486. *E.g.*, MINN. STAT. ANN. § 145.925(8) (West Supp. 1984) (misdemeanor); MONT. CODE ANN. § 50-20-106(4) (1983); N.D. CENT. CODE § 14-02.1-03(3) (1981); 18 PA. CONS. STAT. ANN. § 3215(f), (h) (Purdon 1983).

487. *E.g.*, ARK. STAT. ANN. § 41-2560(c) (1977); CAL. HEALTH & SAFETY CODE § 25955.3 (West 1984); DEL. CODE ANN. tit. 24, § 1791(c) (1981); KY. REV. STAT. § 311.810 (1983); MINN. STAT. ANN. § 145.414 (West Supp. 1984); MO. ANN. STAT. § 197.032(2) (Vernon 1983).

488. *E.g.*, ARK. STAT. ANN. § 41-2560(c) (1977); CAL. HEALTH & SAFETY CODE § 25955.3 (West 1984); DEL. CODE ANN. tit. 24, § 1791(c) (1981); KY. REV. STAT. § 311.810 (1983); ME. REV. STAT. ANN. tit. 22, § 1591 (1980); MD. PUB. HEALTH CODE ANN. § 20-214(c)(2) (1982); MASS. GEN. LAWS ANN. ch. 112, § 12S (West 1983) (patients are to be informed that refusal to undergo abortion is not a ground for denial of public assistance); MO. ANN. STAT. § 197.032(2) (Vernon 1983); OR. REV. STAT. § 435.435 (1983); 18 PA. CONS. STAT. ANN. § 3215(g) (Purdon 1983).

489. *E.g.*, ARK. STAT. ANN. § 41-2560(c) (1977); CAL. HEALTH & SAFETY CODE

consent.⁴⁹⁰ The latter, of course, is a preferably neutral statement, but neutrality is not an evident objective of most such legislation.

VI. CONCLUSIONS AND RECOMMENDATION: A SUNSET LAW ANALOGY FOR ABORTION LEGISLATION?

Unless a right-to-life amendment to the United States Constitution is ratified, the right of women to elect medically indicated abortions is protected. On the other hand, it is unlikely the Court will depart from its position in *Harris v. McRae* that the Constitution does not require that therapeutic abortions be underwritten for financially unable women because of the possible ripple effect a contrary interpretation would have on allocation of public funds in other sensitive areas.⁴⁹¹ The want of public funding may in time impel women to resort to clandestine abortionists and thus recreate a public health problem manifest before 1973.⁴⁹²

State legislatures hostile to the Court's doctrines no doubt will stand pat with their present legislation,⁴⁹³ because they are unwilling to reopen the volatile issue of abortion reform. If other legislatures in good faith track the details of each Supreme Court decision, they

§ 25955.3 (West 1984); DEL. CODE ANN. tit. 24, § 1791(c) (1981); KY. REV. STAT. § 311.810 (1983); ME. REV. STAT. ANN. tit. 22, § 1591 (1980); MD. PUB. HEALTH CODE ANN. § 20-214(c) (1982); MASS. GEN. LAWS ANN. ch. 112, § 12S (West 1983); MINN. STAT. ANN. § 145.414 (West Supp. 1984); MO. ANN. STAT. § 197.032(2) (Vernon 1983); OR. REV. STAT. § 435.435 (1983); 18 PA. CONS. STAT. ANN. § 3215(g) (Purdon 1983).

490. *E.g.*, CAL. HEALTH & SAFETY CODE § 25955.3 (West 1984); KY. REV. STAT. § 311.810 (1983).

491. Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom. To hold otherwise would mark a drastic change in our understanding of the Constitution. It cannot be that because government may not prohibit the use of contraceptives . . . or prevent parents from sending their child to a private school . . . government, therefore, has an affirmative constitutional obligation to ensure that all persons have the financial resources to obtain contraceptives or send their children to private schools. To translate the limitation on governmental power implicit in the Due Process Clause into an affirmative funding obligation would require Congress to subsidize the medically necessary abortion of an indigent woman even if Congress had not enacted a Medicaid program to subsidize other medically necessary services. Nothing in the Due Process Clause supports such an extraordinary result.

Harris v. McRae, 448 U.S. at 317-18 (citations omitted).

492. Clandestine abortion was viewed as a public health problem before 1973, *see, e.g.*, Calderone, *Illegal Abortion as a Public Health Problem*, 50 AM. J. PUB. HEALTH 948 (1960), and has that potential today if the availability of lawful therapeutic abortion is restricted. *Sneideman, supra* note 19, at 192-94.

493. *See supra* notes 139-49 and accompanying text.

may find themselves out of step with the next sequence of constitutional precedent, with defective or inadequate legislation productive of new litigation. Legislating the details of rights to privacy is as futile and unproductive as endeavoring to duplicate through statute the myriad of refined points to doctrine adjudicated under the fourth amendment.

Therefore, as we find ourselves in the mid-1980's, one may wonder whether abortion legislation of any sort is any longer needed. Civil, administrative and disciplinary proceedings can be brought against medical providers who make professionally unsound decisions to abort, and hospitals and clinics can be required to provide appropriate personnel and equipment to safeguard maternal and fetal health and life. Laypersons who offer medically unsupervised abortion services can be prosecuted for unlawful practice of medicine, just as if they had purported to offer any other form of surgical or pharmaceutical treatment. Abortion regulation adds nothing not already achievable through existing general legislation and administrative regulations.

Nor is there a need for special criminal abortion statutes aimed at clandestine or nonmedically indicated abortions, even though they are constitutional.⁴⁹⁴ If a pregnant woman dies as a result of a criminally negligent abortion or bungled aftercare, or if a viable fetus born alive dies for similar reasons, the coverage of manslaughter or criminally negligent homicides statutes is clear. If a neonate's life is intentionally snuffed out, murder or manslaughter provisions are fully available.

If an unqualified person performs an abortion, or a medically qualified person departs the bounds of proper abortion techniques without causing maternal or neonatal death, criminality is clear under modern assault statutes. Administering a substance other than for lawful medical or therapeutic purpose can be made a form of assault,⁴⁹⁵ and the use of instruments almost certainly causes physical injury⁴⁹⁶ or serious physical injury.⁴⁹⁷ If an abortion is unlawful, a woman's con-

494. See *supra* notes 412-15 and accompanying text.

495. See, e.g., N.Y. PENAL LAW § 120.05(5) (McKinney 1975); 30 HALSBURY'S LAWS OF ENGLAND ¶ 43 (4th ed. 1980); MODEL PENAL CODE § 211.1 comment 3-4 (Official Draft & Revised Comments 1980).

496. See N.Y. PENAL LAW § 10.00(9) (McKinney 1975) (physical injury defined as impairment of physical condition or substantial pain), § 120.00(1), (2) (McKinney 1975).

497. See N.Y. PENAL LAW § 10.00(10) (serious physical injury defined as that which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ), § 120.05(1), (2), (4), § 120.10(1), (3). The crime of reckless endangerment also may be available in abortion cases not producing death or injury but substantially risking either. See, e.g., N.Y. PENAL LAW §§ 120.20, 120.25 (McKinney 1975); TEX. PENAL CODE ANN. § 22.05(a) (Vernon 1974); MODEL PENAL CODE § 211.1 (Official Draft & Revised Comments 1980).

sent to it is legally irrelevant to the criminality of the abortionist, since it does not tend to raise a reasonable doubt about the existence of the actus reus element of physical injury or serious physical injury.⁴⁹⁸ If there is an unclear area, it is the criminality of negligent or intentional activity which destroys fetal life during birth processes. If this is a problem, curative legislation should be addressed directly at the basic problem without regard to whether birth processes result from abortion of a viable fetus, induced labor, or spontaneous premature or near-term miscarriage.

Accordingly, just as some states have legislated the demise of a great many regulatory provisions affecting professions, occupations, businesses, industries and enterprises, which have no affirmative justification for perpetuation,⁴⁹⁹ so legislatures should recognize that abortion legislation is currently unnecessary and unproductive, and terminate all special legislation relating to abortions, whether lawful or unlawful.

498. See, e.g., *State v. Brown*, 143 N.J. Super. 571, 364 A.2d 27 (Super. Ct., Law Div. 1976), *aff'd*, 154 N.J. Super. 511, 381 A.2d 1231 (Super. Ct. App. Div. 1977); MODEL PENAL CODE § 211.1, (2)(a) (Official Draft & Revised Comments 1980); *Green*, *supra* note 249, at 99-100; Comment, *Mayhem: Consent of Maimed Party as a Defense*, 47 IOWA L. REV. 1122, 1127 n.25 (1961-1962).

499. See, e.g., ALA. CODE §§ 41-20-1 to 41-20-16 (1982); FLA. STAT. ANN. § 11.61 (West Supp. 1984), N.H. REV. STAT. ANN. §§ 17-G.1 to .10 (Supp. 1983); W. VA. CODE §§ 4-10-1 to 4-10-14 (Supp. 1984) (sunset law).

For a model abortion law consistent with the Supreme Court's doctrines, see Comment, *A Decade of Cementing the Mosaic of Roe v. Wade: Is the Composite a Message to Leave Abortion Alone?*, 15 U. TOL. L. REV. 681, 749-53 (1984). Other legislative proposals appear in Walker & Puzder, *State Protection of the Unborn After Roe v. Wade: A Legislative Proposal*, 13 STETSON L. REV. 237 (1984).

